



Committee for Public Counsel Services  
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# ASSIGNED COUNSEL MANUAL

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## POLICIES AND PROCEDURES

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This manual informs attorneys representing indigent clients through the Committee for Public Counsel Services, pursuant to G.L. c. 211D of the qualification, training, and performance requirements, the billing process, audit and evaluation procedures, and other policies and procedures related to assignment and compensation.

**Attorneys who accept assignments of cases, pursuant to G.L. c. 211D, are required to follow the policies and procedures in this manual and any other CPCS publications, and any amendments, revisions, or additions to CPCS policies and procedures. Court Cost Vendors who accept compensation from the Indigent Court Cost Act, G.L. c. 261, §§ 27A-D, are required to follow the policies and procedures in the Court Cost Vendor Manual and any other CPCS publications, and any amendments, revisions, or additions to CPCS policies and procedures.**

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# 1. Scope of Services of Committee for Public Counsel Services for Persons Determined to be Indigent by the Court

The Committee assigns counsel in the trial and appellate courts for:

## A. Criminal Matters

1. Defendants in criminal matters where incarceration is possible

## B. Juvenile Matters

1. Juveniles in delinquency matters
2. Juveniles in Youthful Offender matters
3. Juveniles in revocation of grants of conditional liberty in DYS proceedings
4. Clients in Juvenile Parole matters

## C. Child Welfare/State Intervention and Family Law Matters

1. Parents and children in care and protection cases (G.L. c. 119, § 29)
2. Parents and children and in other proceedings regarding child custody in which DCF or a licensed placement agency is a party (G.L. c. 119, § 29)
3. Parents and children in divorce or paternity actions in which the court is contemplating giving custody of a child to DCF (*Balboni v. Balboni*, 39 Mass. App. Ct. 210 (1995))
4. Parents and children in permanency hearings (G.L. c. 119, §§ 29B, 29C)
5. Children in all child requiring assistance cases (G.L. c. 119, § 39F) and parents in such cases if the court is considering taking custody of the child or if there is a hearing or proceeding regarding custody of the child (*Matter of Hilary*, 450 Mass. 491 (2008); G.L. c. 119, § 39F)
6. Children who are the subjects of guardianship petitions (if counsel is requested or if the court determines counsel is warranted under G.L. c. 190B, § 5-106), parents who contest the entry of or seek modifications of guardianship orders (*Guardianship of V.V.*, 470 Mass. 590 (2015); *L.B. & another v. Chief Justice of the Probate and Family Court Department & others*, 474 Mass. 231 (2016)), and

guardians in a petition for removal, if the court determines that the guardian has been the primary caretaker for the child for not less than 2 years or for an otherwise significant period of time during the child's lifetime. This period of time may include caretaking provided during or prior to the guardianship. The guardian must satisfy the requirements for indigency. (G.L. c. 190B § 5-212(d)).

7. Young adults between the ages of 18 and 22 who are under the continued responsibility of DCF. G.L. c. 119, § 23(f)
8. Parents and children in termination of parental rights actions brought by the Commonwealth or a licensed child care agency (G.L. c. 210, § 3) and parents contesting such actions brought by others (*Adoption of Meaghan*, 461 Mass. 1006 (2012))
9. Minors less than 16 years of age seeking judicial consent for abortions (G.L. c. 112, § 12R)

D. Mental Health Matters

1. Guardianship and acceptance of foreign guardianship (G.L. c. 190B, § 5-106)
2. Validation of healthcare proxy (G.L. c. 201D, § 17)
3. Authorization to admit to a nursing home for less than 60 days (G.L. c. 190B, § 5-309 (g))
4. Substituted judgment guardianship for extraordinary treatment (for example, anti-psychotic medication, or *Rogers* cases)(G.L. c. 190B, § 5-106)
5. Persons being held involuntarily (G.L. c. 123, §12b)
6. Respondents in petitions to commit as mentally ill (G. L. c. 123, §§ 7, 8, 16, 18)
7. Respondents in petitions for authorization to treat for mental illness (G. L. c. 123, § 8B)
8. Persons appealing from commitment orders and authorizations to treat (G.L. c. 123, § 9(a))
9. Persons committed as mentally ill petitioning for discharge (G.L. c. 123, § 9b)
10. Respondents in Warrants of Apprehension (G. L. c. 123, § 12(e))
11. Respondents in petitions to commit for alcohol or substance abuse (G. L. c. 123, § 35)

E. Sexually Dangerous Person Matters

1. Respondents in petitions to commit as sexually dangerous (G.L. c. 123A, §§ 12-15)
2. Persons declared sexually dangerous petitioning for release (G.L. c. 123A, § 9)

F. Sex Offender Registry Matters

1. Individuals at classification hearings before the Sex Offender Registry Board (G.L. c. 6, § 178L)
2. Individuals appealing classification decisions of the Sex Offender Registry Board (G.L. c. 6, § 178M; G.L. c. 211D, § 16)

## A. **General Policies Applicable to All Assigned Counsel**

By accepting assignment of any case through CPCS, counsel must comply with all CPCS Policies and Procedures outlined in the Assigned Counsel Manual.

### A. **Attorney Cooperation with Monitoring**

Attorneys must cooperate with monitoring, performance evaluations and investigations of any complaints, including billing discrepancies, by CPCS or its designee.

### B. **Office, Telephone, and E-mail**

The attorney must maintain an office or have other private meeting space easily accessible to clients with cases in the court in which they provide assigned representation and that is easily accessible by public transportation to the client population. The attorney must also maintain a means for regularly receiving mail and collect telephone calls from clients.

Additionally, the attorney must maintain a working e-mail account as a means of receiving information from and providing information to CPCS. Any changes to attorney's email address, work telephone number and/or postal address is made through the CPCS Vendor Portal (<https://vendorportal.publiccounsel.net>).

### C. **Notice of Complaints or Potential Conflicts**

An attorney certified or approved to take assignments in CPCS cases, whether through the Private Counsel Division, the Children and Family Law (CAFL) Division, the Public Defender Division, the Youth Advocacy Division, or the Mental Health Litigation Division, shall notify the appropriate Deputy Chief Counsel (Deputy) or Director within three business days of learning of any of the following:

1. The attorney has been charged in any criminal complaint or indictment.
2. A complaint has been opened in a CPCS assigned case by the Office of Bar Counsel (OBC) of the Massachusetts Board of Bar Overseers (BBO) or a petition for discipline has been filed in any case by the OBC or the attorney licensing authority of any other state or jurisdiction.

3. The attorney is the subject of disciplinary action before any non-attorney professional licensing board or agency.
4. The attorney's license to practice law has been suspended or terminated for any reason, including for administrative reasons such as non-payment of bar dues.
5. The attorney is certified to provide representation in CAFL cases, and either of the following is true:
  - a. S/he is or applies to become involved with the Department of Children and Families (DCF), other than in his or her professional capacity as counsel.

For purposes of this paragraph "is or applies to become involved with DCF" includes but is not limited to the following: serving or applying to serve as a foster parent or pre-adoptive parent of a child in DCF custody; applying to serve as a guardian or adoptive parent of a child in DCF custody; serving as a DCF-subsidized guardian or DCF-subsidized adoptive parent of a child; having an open administrative case with DCF (including a case open for voluntary services); being subject to an investigation under G.L. c. 119, § 51B; and being a respondent in a care and protection or similar judicial proceeding.

- b. His or her child is the subject of a child requiring assistance proceeding.
6. A court or an administrative agency has found that the attorney has engaged in conduct which is subject to mandatory reporting under Rule 8.3 of the Massachusetts Rules of Professional Conduct.
7. Any condition or circumstance exists that renders the attorney unable to comply with applicable CPCS Performance Standards or Policies.
8. Any conduct that constitutes a violation of any of the attorney's ethical duties.

The obligations set forth above apply independently of each other and without regard to either the jurisdiction in which the proceedings are instituted or take place, or whether any portion of said proceedings are otherwise considered to be private or confidential.

With regard to a complaint opened or petition for discipline filed by the Massachusetts BBO or the attorney licensing authority of any other state or

jurisdiction, in addition to the notification required by [paragraph \(2\) above](#), the attorney shall, within three business days of learning of such complaint or disciplinary action, provide a copy of the complaint or petition to the appropriate Deputy or Director. The attorney shall also provide to the appropriate Deputy or Director a copy of his or her answer to the complaint or petition within one week after its filing. Finally, within one week after the disposition or resolution of a complaint or disciplinary action before the BBO or the attorney licensing authority of any other state or jurisdiction, including a disposition or resolution under which imposed discipline does not take effect immediately, the attorney shall provide to the appropriate Deputy or Director a copy of any order, agreement, or other document which sets forth the disposition or resolution of the matter.

The requirements of this section shall apply regardless of whether the complaint or other disciplinary action, including the final disposition or resolution of the complaint or disciplinary action, is treated as a public or private matter by the BBO or other licensing authority.

Except as permitted by G.L. c. 211D or other statute, court rule, court order, or similar mandate, the Committee and its staff shall keep confidential all information involving allegations that an attorney has engaged in misconduct or that an attorney's physical or mental condition may adversely affect his or her ability to practice law and shall maintain information reported under this section exclusively for the performance of the Committee's responsibilities under G.L. c. 211D or court rule. Such information shall not be disseminated to any person or organization for any other purpose without the prior written consent of the attorney or until the matter otherwise becomes public.

#### **D. Professional Relationships**

The attorney must treat the client in a courteous and professional manner. Romantic or sexual contact between attorney and client, or between a supervising attorney and supervisee, is strictly prohibited.

#### **E. Compensation**

The attorney shall not accept any compensation or other consideration for assigned representation except through the Committee for Public Counsel Services. This rule applies to both indigent cases and marginally indigent cases.

**F. Privately Retained Counsel on Related and Unrelated Cases**

For guidelines and policies regarding clients wishing to retain assigned counsel on related and unrelated cases, see [Chapter 5](#) of this Manual.

**G. Certification Requirements**

Attorneys accepting cases for which they are not certified will not be paid for those cases.

**H. Use of Interpreters**

Courts are required to provide all hearing-impaired clients (G.L. c. 221, § 92A) and all non-English speaking clients (G.L. c. 221C) with the services of a court-certified or professional interpreter at all in-court proceedings, regardless of the language skills of counsel. It is the responsibility of assigned counsel to make sure that the court provides such interpreter services for his or her client. It is the responsibility of the court to pay for in-court interpreter services.

For out-of-court pre-trial preparation, including client interviews, the attorney representing the hearing-impaired or non-English-speaking client should obtain the services of a court-certified or professional interpreter, unless counsel is fluent in the client's language. It is the responsibility of assigned counsel to ensure the provision of a court-certified or professional interpreter for these purposes, by moving the Court to approve funds pursuant to G.L. c. 261, §§ 27A-27G. CPCS will pay for out-of-court interpreter services upon presentation of the allowed motion and appropriate billing. See [Chapter 6](#) of this Manual.

**I. Use of Associates and Paralegals**

No prior permission is required to obtain the services of an associate or qualified paralegal. The permissible uses of associates in Children and Family Law cases are more expanded than in other practice areas. In other practice areas, assigned attorneys may not delegate to associates or paralegals the handling of continuances, hearings, or any part of a trial or oral argument. The delegation of prohibited tasks to associates or paralegals is a violation of the CPCS Performance Guidelines and Standards. Attorneys may not delegate any associate or paralegal tasks to an attorney suspended by CPCS. For further information regarding the use of Associates and Paralegals, and the process for receiving reimbursement for their services, see [Chapter 5](#) of this Manual.

## **J. Liability Insurance**

To protect client interests, every attorney accepting assignments to represent indigent persons pursuant to G.L. c. 211D must maintain continuous professional liability (malpractice) insurance with a coverage amount of not less than either \$100,000/\$300,000 or \$250,000/\$250,000, and with a deductible of not more than \$15,000.

Attorneys should be aware that allowing coverage to lapse or be canceled can have the effect of voiding coverage for claims made prior to the date of any new policy. In addition, attorneys who purchase "claims made" professional liability insurance should include a "prior acts" date which covers all work performed on behalf of CPCS clients. In sum, it is extremely important to maintain continuous insurance coverage from one policy period to the next, with a "prior acts" date which remains the same from year to year covering all work performed on behalf of CPCS clients.

In view of this concern, if an attorney is a member of any Bar Advocate Program(s), then the program(s) must be named as a "Certificate Holder" of the insurance policy entitled to notice if the policy lapses or is canceled. If the attorney does not belong to any Bar Advocate Program(s), or if an attorney ceases to be a member of any Bar Advocate Program(s), then the Committee for Public Counsel Services, Attn: Audit & Oversight, 75 Federal Street, 6<sup>th</sup> Floor, Boston MA 02110, must be named as the Certificate Holder.

In the event an attorney does allow their insurance to lapse or be canceled, that attorney shall immediately notify their Bar Advocate Program(s) and the CPCS Audit and Oversight Department at [Attyins@publiccounsel.net](mailto:Attyins@publiccounsel.net) in writing. The attorney shall then immediately obtain and provide a copy of a new policy of insurance to their Bar Advocate Program(s) and CPCS which establishes a "prior acts" date restoring coverage for at least the preceding three years, or from the date they began accepting case assignments if that date was more recent. Although the Committee requires that attorneys re-establish their retroactive coverage for a minimum of three years pursuant to this Section, attorneys are encouraged to consider, if feasible, re-establishing coverage for six years, or for an even longer period if they have been accepting assignments for a period exceeding six years, since the cost of additional coverage beyond the last three years may be negligible depending upon the individual attorney's professional work history.

Attorneys who do not provide proof of continuous professional liability upon request are ineligible to receive new assignments and to receive payments for services provided and may have their existing cases reassigned. In addition, to protect CPCS clients, if a private attorney stops accepting assignments for any reason, including retirement, then the attorney should either continue his or her malpractice coverage for at least three years from the last CPCS date of service, or they should obtain tail coverage, also known as an extended reporting period, for at least three years forward from the last CPCS date of service.

Attorneys are reminded that pursuant to Rule 4:02 of the Supreme Judicial Court of Massachusetts, they are required to inform the Board of Bar Overseers within thirty days

if their existing professional liability insurance lapses or is cancelled for any reason. S.J.C. Rule 4:02 sec. 2(A)a states:

“Each attorney shall, as part of the annual filing required by subsection (1) of this rule and on forms provided by the Board for this purpose, certify whether he or she is currently covered by professional liability insurance and provide the following additional information concerning such insurance: the name and address of the carrier, the policy number, and the start and end dates of the policy. Each attorney currently registered as active in the practice of law in this Commonwealth who reports being covered by professional liability insurance shall notify the Board in writing within thirty days if the insurance policy providing coverage lapses or terminates for any reason without immediate renewal or replacement with substitute coverage.”

## **K. Case File Retention**

### 1. Client Case Files

Attorneys are required to keep the contents of all client case files in keeping with [Chapter 5\(X\)](#) for a period of time consistent with [Massachusetts Rules of Professional Conduct, 1.15A](#) §§(c) and (f). However, attorneys are required to retain a physical or digital copy of the client’s file for the period of time established pursuant to Rule 1.15A even if the attorney has transferred the client’s file to the client or as otherwise directed by the client pursuant to Massachusetts Rules of Professional Conduct 1.15A. Following the transfer of a client’s file, attorneys shall document and identify contents of a client’s file that cannot be digitized or copied (such as physical evidence or notarized documents), by photographing and fully describing the item(s), and by recording the date and to whom the item(s) were transferred in the attorney’s case time records.

#### a. Reimbursement of Expenses

For the limited purpose of complying with this rule, private attorneys may seek reimbursement for the actual and reasonable cost paid for digitizing or photocopying the client’s case files by complying with the following procedure:

(i) the attorney shall request authorization from the relevant panel director in writing via electronic mail to seek reimbursement for such costs. Such authorization shall be at the sole discretion of the panel director.

(ii) If it is necessary to re-open a NAC to bill for this expense, the attorney shall send an email to [ebill@publiccounsel.net](mailto:ebill@publiccounsel.net) attaching the panel director’s written approval.

(iii) Reimbursement is made via submission of an Ebill Voucher and in accordance with Section 5DD.

(iv) The reimbursement for in-office digitizing or photocopying shall be consistent with the rate set forth in Section Z.2 of Chapter 5 “Photocopying and Postage.”

**Commentary:** Attorneys are reminded that the duty of confidentiality extends to all

case materials and attorneys should not provide case materials to third parties without the client's consent and adequate confidentiality agreements in place. Pepe, 26 Mass. Atty Disc. R. 497 (2010).

## 2. Time Records

Attorneys are required to maintain their complete contemporaneous time records and billing records for each assignment in keeping with Chapter 5(X) for a period of not less than 6 years following conclusion of the case or the time period required in K.1. above, whichever is longer.

### **L. Panel Participation**

Service on CPCS panels is at the discretion of the Chief Counsel.

### **M. Publication of Policies of the Committee for Public Counsel Services**

All attorneys receiving case assignments through the Committee for Public Counsel Services must regularly review the CPCS website, [www.publiccounsel.net](http://www.publiccounsel.net) for updates of CPCS policies, procedures, and guidelines. New and revised policies are posted on the website periodically. Notice of new and revised policies and procedures are also posted periodically on E-Bill.

Attorneys receiving case assignments through CPCS receive bulletins, newsletters, and emails from the CPCS divisions in which they practice. Attorneys are expected to apprise themselves of all CPCS rules and policies contained in those communications, published in this Manual, and on the CPCS website, [www.publiccounsel.net](http://www.publiccounsel.net). Attorneys are also responsible for apprising themselves of the information contained in notices posted on E-Bill.

### **N. Legislative Restriction on Payment of Late Bills**

State law prohibits CPCS from paying private counsel bills received more than 90 days after either the conclusion of a case or the end of a fiscal year, absent a finding by the Chief Counsel "that the delay was due to extraordinary circumstances beyond the control of the attorney." G.L. c. 211D, § 12(a). Bills received after August 1 but on or before September 30 are subject to a 10% reduction under the same statute. In keeping with established policy, old bills are subject to pre-payment review by CPCS's Audit and Oversight Department.

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## **A. PREAMBLE**

The Committee has adopted requirements that attorneys must meet in order to receive assignments. Attorneys must demonstrate their qualifications and be certified by the Committee in order to be assigned cases and compensated by the Committee. Attorney certification may be subject to ongoing legal education requirements and periodic recertification, depending on the panel. Additionally, criminal and delinquency attorneys receiving district court or non-murder superior court assignments must comply with their county bar advocate programs' enunciated requirements. A directory of these programs is available online at [www.publiccounsel.net/dir/bar-ad-offices](http://www.publiccounsel.net/dir/bar-ad-offices).

Attorneys wishing to be certified should consult the requirements and follow the procedures set forth in this chapter. Attorneys accepting cases for which they are not certified will not be compensated for work on those cases.

## **B. CRIMINAL PROCEEDINGS**

### **1. DISTRICT COURT CASES**

Attorneys who wish to accept misdemeanors and concurrent felonies in the District Court must (1) be accepted into the panel of attorneys of a county bar advocate program; (2) complete a required training program; and (3) be certified by CPCS. For information on being accepted into a bar advocate program, contact the program in the counties in which

you wish to practice. A directory of these programs is available online at [www.publiccounsel.net/dir/bar-ad-offices](http://www.publiccounsel.net/dir/bar-ad-offices).

**a. Training Requirements:**

Once an attorney is accepted into a bar advocate program, the program will submit that attorney's name for attendance at the next CPCS Zealous Advocacy Training (ZAT) program. The program is administered by the CPCS Criminal Defense Training Unit in the Spring and Fall of each year. ZAT is a four-week hybrid program which combines on your own learning and live, in-person sessions at various locations around the state.

Attorneys who successfully complete the training and meet case assignment and billable hour thresholds within eighteen (18) months of completing the training will receive a payment equal to the number of training hours times the current district court rate. District Court attorneys must bill at least 600 hours on at least 30 separate dockets to receive the payment. "No Case Duty Day" hours will count toward the total (see [Chapter 5 § FF - Duty Days](#)).

CPCS certified attorneys who are required to attend ZAT as a remedial measure will not receive the payment.

Information on upcoming training programs can be obtained by contacting the attorney's bar advocate program.

**b. Certification:**

Attorneys who complete the training requirement and receive District Court certification by CPCS may represent indigent adults who are charged with misdemeanors and felonies that are within the final jurisdiction of the District Court as set forth in G.L. c. 218, § 26.

Initial certification of a private attorney joining a bar advocate program after completion of the Zealous Advocacy Training (ZAT) or after a waiver of the ZAT is provisional, subject to a performance evaluation(s) of the private attorney by the county bar advocate program conducted within 12 to 24 months, or a longer period if deemed necessary. Counsel must have a body of assigned legal work that includes at least 25 cases during the period of review. The evaluation of the private attorney will include a file review of cases prepared for substantive hearings, trial, and cases of clients in custody. The Supervising Attorney conducting the evaluation will select the assigned cases for review. The private attorney shall cooperate with the evaluation of their court-assigned work and failure to do so may result in not being certified to take court assignments. The certification determination will be based upon evidence of compliance with relevant Performance Guidelines set out in this manual in Chapter 4.

If deemed necessary by the Supervising Attorney conducting the review, Counsel may be required to engage in remedial mentoring.

Provisional certification may be revoked at any time for reasons including but not limited to failure to comply with mentoring protocols, failure to make sufficient progress toward full certification, or deficient performance relative to the performance standards for adult criminal trial proceedings.

Attorneys certified for District Court cases may also represent indigent defendants charged with Superior Court felonies other than murder and accessory before the fact to murder in the district court for arraignment and bail hearings only or until successor counsel is appointed or retained. If the attorney is not properly certified, they must immediately notify the Bar Advocate Program of the need for prompt reassignment of a bind-over felony case after the arraignment.

Dangerousness hearings under G. L. c. 276, § 58A are considered substantial proceedings in the case, requiring the same certification as the case in chief. Dangerousness hearings in bind-over felony cases must be handled by properly certified attorneys only except for extenuating circumstances when a properly certified attorney is unavailable. In such cases, the arraignment attorney will confer with their Supervising Attorney to determine if the arraignment attorney should conduct the Dangerousness Hearing. If a dangerousness hearing in a bind-over felony case is requested by the prosecutor, assigned counsel lacking certification to handle the case in chief should request a brief continuance and immediately notify the Bar Advocate Program to promptly reassign the case. The arraignment attorney should remain in contact with the client until successor counsel is appointed or retained.

To handle probable cause hearings in District Court or Superior Court jurisdiction felonies (other than arraignment and bail hearing), attorneys must be properly certified.

**c. Assignment of Cases:**

District Court cases are assigned through the county bar advocate programs.

**d. Performance Requirements:**

Attorneys who accept District Court cases must represent their clients at all stages of the criminal proceedings in the District Court. In the event of a final conviction in the District Court, it is the responsibility of the trial attorney to file a Notice of Appeal within 30 days after sentencing and to order the transcripts of the trial, the sentencing hearing and all other significant pre- and post-trial hearings. Trial counsel should then notify the CPCS Private Counsel Appeals Assignment Unit of the need for appellate counsel to be assigned by filling out and submitting the Appeal Referral Form.

By accepting assignments on District Court cases attorneys agree to abide by the [CPCS Performance Standards Governing Representation of Clients in Criminal Trial Cases](#), which are found in this manual at [Chapter 4](#), and are available online at

## **2. DISTRICT COURT PLUS (DCP) CERTIFICATION**

District Court Plus Certification allows District Court certified attorneys to accept matters with Superior Court Only jurisdiction while the cases are pending in the District Court, including conducting 58A dangerousness hearings and probable cause hearings (“bind over hearings”).

### **a. Minimum Requirements:**

- i.** An attorney has at least one (1) criminal jury trial as lead defense counsel. An Attorney has completed a ten (10) hour training program with the CPCS Criminal Defense Training Unit.
- ii.** An attorney without a jury trial may become DCP certified but must be assigned Superior Court mentor to assist and advise counsel when appointed to a DCP matter.
- iii.** Meeting the minimum requirements does not ensure acceptance to the panel; review of the application includes, among other considerations, determining counsel’s use of experts, Social Service Experts, and investigators, as well as evaluations, complaints, and the opinion of local practitioners.

### **b. How To Get Approved:**

When notified that application process is open, submit the application for “District Court Plus” to [crimrecertification@publiccounsel.net](mailto:crimrecertification@publiccounsel.net).

### **c. Limits:**

If case is indicted, it must be transferred to a superior court certified attorney.

### **d. Pay Rate:**

Counsel is paid at the superior court rate for all work conducted on the case while it is pending in the district/municipal court.

## **3. SUPERIOR COURT REQUIREMENTS**

In order to be certified to accept superior court cases (that is, any charge which is beyond final jurisdiction of the district court as set out in G.L. c. 218, § 26), attorneys must be individually approved by the Chief Counsel of CPCS or designee. Attorneys who seek to obtain the approval of the Chief Counsel or designee must meet the minimum requirements set forth below. In addition, the Chief Counsel or designee may consider any and all additional information deemed relevant to an appropriate decision on each application.

**a. Training Requirements:**

There is no training prerequisite for initial certification; 8 hours of CLE per fiscal year is required to maintain certification. Attorneys should maintain records of their continuing legal education.

**b. Minimum Requirements:**

Applicants who meet the criteria described in any one of the following four categories are eligible to apply to the Chief Counsel or designee for approval for Superior Court cases. To apply, the applicant must

- i. Be certified by CPCS to accept murder cases.
- ii. Meet the minimum requirements for certification for murder cases (outlined in this manual)
- iii. Have tried at least six District Court or Superior Court criminal jury trials to verdict in the last twelve (12) years as lead defense counsel.
- iv. Have other significant experience which demonstrates qualification to accept Superior Court assignments and demonstrates familiarity with the practice and procedures in the Massachusetts criminal courts.

**c. Application Procedure:**

Attorneys seeking Superior Court assignments should complete and submit an application form available on the CPCS website at [https://www.publiccounsel.net/wp-content/uploads/2023/01/Superior-Court\\_Application\\_2023.pdf](https://www.publiccounsel.net/wp-content/uploads/2023/01/Superior-Court_Application_2023.pdf) as well as provide any additional information relevant to the above-stated requirements. The Chief Counsel or designee will notify the applicant when a decision has been made.

**d. Assignment of Cases:**

Superior Court certified attorneys may be assigned Superior Court jurisdiction cases in District Court as bar advocate duty attorneys or may receive assignments from bar advocate programs immediately after arraignments handled by bar advocate duty attorneys who are not Superior Court certified. Superior Court certified attorneys may also be assigned cases in Superior Court after direct indictment.

**e. Performance Requirements:**

Attorneys who accept Superior Court cases must represent their clients at all stages of the criminal proceedings except the appeal of a conviction to the Appeals Court or Supreme Judicial Court. In the event of a conviction, however, it remains the

responsibility of the trial attorney to file a Notice of Appeal within 30 days after sentencing, and to order the transcript of the trial, sentencing hearing, and all other significant pre- and post-trial hearings. Trial counsel should then notify the CPCS Private Counsel Appeals Assignment Unit of the need for appellate counsel to be assigned by completing and submitting the Appeal Referral Form. In addition to representing the client in Superior Court, the attorney who accepts a Superior Court case must provide representation at the probable cause hearing or any other District Court proceeding and any sentence appeal before the Appellate Division of the Superior Court.

By accepting assignments on Superior Court cases, attorneys agree to abide by the CPCS Performance Guidelines Governing Representation of Indigents in Criminal Cases, which are found in this manual at Chapter 4, and are available online at [www.publiccounsel.net](http://www.publiccounsel.net).

#### **4. SUPERIOR COURT JURISDICTION CASES**

In order to be certified to accept Superior Court cases (that is, any charge which is beyond final jurisdiction of the District Court as set out in G.L. c. 218, § 26), attorneys must be individually approved by the Chief Counsel of CPCS or designee. If attorneys seek to obtain the approval of the Chief Counsel or designee must meet the minimum requirements set forth below. In addition, the Chief Counsel or designee may consider any and all additional information deemed relevant to an appropriate decision on each application.

##### **a. Training Requirements:**

There is no training prerequisite for initial certification; 8 hours of CLE per fiscal year is required to maintain certification. Attorneys should maintain records of them continuing legal education.

##### **b. Minimum Requirements:**

Applicants who meet the criteria described in any one of the following four categories are eligible to apply to the Chief Counsel or designee for approval for Superior Court cases. To apply, the applicant must:

- i.** Be certified by CPCS to accept murder cases. Meet the minimum requirements for certification for murder cases. (Outlined in this manual).
- ii.** Have tried at least six District Court or Superior Court criminal jury trials to verdict in the last twelve (12) years as lead defense counsel.
- iii.** Have other significant experience which demonstrates qualification to accept Superior Court assignments and demonstrates familiarity with the practice and procedures in the Massachusetts criminal courts.

**c. Application Procedure:**

Attorneys seeking Superior Court assignments should complete and submit an application form available on the CPCS website at [https://www.publiccounsel.net/wp-content/uploads/2023/01/Superior-Court\\_Application\\_2023.pdf](https://www.publiccounsel.net/wp-content/uploads/2023/01/Superior-Court_Application_2023.pdf). The Chief Counsel or designee will notify the applicant when a decision has been made.

**d. Assignment of Cases:**

Superior Court certified attorneys may be assigned Superior Court jurisdiction cases in District Court as bar advocate duty attorneys or may receive assignments from bar advocate programs immediately after arraignments handled by bar advocate duty attorneys who are not Superior Court certified. Superior Court certified attorneys may also be assigned cases in Superior Court after direct indictment.

**e. Performance Requirements:**

Attorneys who accept Superior Court cases must represent their clients at all stages of the criminal proceedings except the appeal of a conviction to the Appeals Court or Supreme Judicial Court. In the event of a conviction, however, it remains the responsibility of the trial attorney to file a Notice of Appeal, a Motion to withdraw, and a Motion to Appoint Substitute Counsel for Appeal. Trial counsel should also request a transcript of the trial, sentencing hearing, and all other significant pre-and post-trial hearings. Trial counsel should then notify the CPCS Private Counsel Appeals Assignment Unit of the need for appellate counsel to be assigned.

In addition to representing the client in Superior Court, the attorney who accepts a Superior Court case must provide representation at the probable cause hearing or any other District Court proceeding and any sentence appeal before the Appellate Division of the Superior Court.

By accepting assignments on Superior Court cases, attorneys agree to abide by the CPCS Performance Guidelines Governing Representation of Clients in Criminal Trial Cases, which are found in this manual at Chapter 4, and are available online at [www.publiccounsel.net](http://www.publiccounsel.net).

**5. SUPERIOR COURT SECOND CHAIR**

Allows approved attorneys to second seat Lead Counsel on Superior Court trials. Approved attorneys will be added to a list that Superior Court certified attorneys can choose from. Approved attorneys can use two of these second chair trials towards the “6 trial requirement” on the Superior Court Certification application. All other requirements remain the same.

**a. Minimum Requirements:**

- i. Familiarity with practice and procedure of Massachusetts criminal courts.
- ii. Lead counsel in the preceding ten (10) years in at least two (2) district court jury trials.
- iii. Meeting the minimum requirements does not ensure acceptance to the panel; review of the application includes, among other considerations, determining counsel's use of experts, Social Service Experts, and investigators, as well as evaluations, complaints, and the opinion of local practitioners.

**b. How to get approved:**

Submit the application for "Superior Court Second Chair" assignments to [crimrecertification@publiccounsel.net](mailto:crimrecertification@publiccounsel.net).

**c. Duties:**

At the discretion of Lead Counsel, the Certified Superior Court Second Chair can perform direct and cross-examination of witnesses during the trial. Lead Counsel should still perform most of these duties.

**d. Limits:**

Cannot conduct opening or closing arguments except in circumstances where it would be clearly beneficial to the client. Lead Counsel must be present in court for all evidentiary hearings.

**e. Pay Rate:**

District Court rate.

**f. Billing:**

Lead Counsel should request Second Chair NAC from Bar Advocate Program Administrator.

**6. SUPERIOR COURT APPROVAL**

Selected attorneys can take one (1) Superior Court case with a mentor. At the end of the case or after one (1) year, the selected attorney may be recommended for Superior Court certification by a supervising attorney.

**a. Minimum Requirements:**

The attorney must have at least two years of experience as a criminal defense attorney. The attorney must have tried, as lead or primary counsel, at least three (3) criminal jury trials to verdict or must have sufficient comparable litigation experience.

**b. How to get approved:**

Contact a supervising attorney from your county with a statement regarding your interest in the program. If you need help finding your Supervising Attorneys, contact the Criminal Trial Support Unit (CTSU) Attorney for your county.

**c. Duties:**

Approved attorney will handle one (1) Superior Court case from start to finish.

**d. Limits:**

Mentor must second chair the approved attorney at trial and must be available to work with and guide the approved attorney throughout the pendency of the case.

**e. Pay rate:**

Paid at the Superior Court rate.

**f. Billing:**

Selected attorneys will have their own NAC to bill on. Please contact your county's CTSU attorney prior to billing on the NAC. They will navigate any billing issues for you. Mentor gets a Mentor NAC.

**7. MURDER LIST CERTIFICATION**

**First- and Second-Degree Murder Cases:**

Attorneys who wish to be certified to accept first- and second-degree murder cases must be individually approved by the Chief Counsel of CPCS or designee. Each applicant must meet the minimum requirements set forth below. In addition, the Chief Counsel or designee may consider any and all additional information deemed relevant to an appropriate decision on each application. In reaching this decision, the Chief Counsel or designee receives a recommendation on each application from a Certification Advisory Board consisting of senior private practitioners from around the state.

**a. Training Requirements:**

There is no training prerequisite for initial certification; eight (8) hours per year of relevant legal education are required to maintain this certification.

**b. Minimum Requirements:**

- i.** Five years of criminal litigation experience.
- ii.** Familiarity with practice and procedure of Massachusetts criminal courts. 10 jury trials in which the applicant was lead defense counsel (a jury trial is defined as a trial that was submitted to a jury and resulted in a verdict or a deadlocked jury) within 12 years preceding the application, and, of the 10 jury trials, 5 must have been serious and complex. A serious and complex case is defined as the indicted lead offense is classified in offense seriousness levels 6, 7, 8, or 9 of the Massachusetts Sentencing Guidelines and has a maximum penalty of 15 years or more.

Meeting the minimum requirements does not assure acceptance to the panel; review of the application includes, among other considerations, determining counsel's use of experts, including Social Service Experts, and investigators, as well as evaluations, complaints, and the opinion of

local practitioners.

**iii. Application Procedure:**

Attorneys seeking murder assignments should complete and submit an application form available on the CPCS website at [https://www.publiccounsel.net/wp-content/uploads/2023/01/Murder-List-Application\\_2023.pdf](https://www.publiccounsel.net/wp-content/uploads/2023/01/Murder-List-Application_2023.pdf) as well as provide any additional information relevant to the above-stated requirements. Applicants will be notified of the decision of the Chief Counsel or designee.

**iv. Assignment of Cases:**

Under the provisions of G.L. c. 211D, § 8, the Chief Counsel will assign murder cases to attorneys certified to handle such cases, subject to the approval of the justice making the determination of indigence.

**v. Performance Requirements:**

Attorneys who accept murder cases must represent their clients at all stages of the criminal proceedings except the appeal of a conviction to the Appeals Court or Supreme Judicial Court. In the event of a conviction, however, it remains the responsibility of the trial attorney to file a Notice of Appeal, a Motion to Withdraw, and a Motion to Appoint Substitute Counsel for Appeal. Trial counsel should also request a transcript of the trial, sentencing hearing, and all other significant pre- and post-trial hearings. Trial counsel should then notify the CPCS Private Counsel Appeals Assignment Unit of the need for appellate counsel to be assigned.

In addition to representing the client in Superior Court, the attorney who accepts a murder case must provide representation at the probable cause hearing or any other District Court proceeding.

By accepting assignments on murder cases, attorneys agree to abide by the CPCS Performance Guidelines Governing Representation of Clients in Criminal Trial Cases, which are found in this manual in Chapter 4 and are available online at [www.publiccounsel.net](http://www.publiccounsel.net).

## **C. DELINQUENCY, YOUTHFUL OFFENDER PROCEEDINGS, DYS GRANT OF CONDITIONAL LIBERTY REVOCATION PROCEEDINGS, AND JUVENILE PAROLE PROCEEDINGS**

### **1. JUVENILE DELINQUENCY PROCEEDINGS**

The Committee for Public Counsel Services has approved the following certification

requirements.

**a. Juvenile Delinquency Certification**

Attorneys wishing to represent juveniles in delinquency proceedings must have at least one year of high-quality district court (or comparable) trial experience and eight (8) hours of juvenile-specific training within 12 months of application for certification.

Attorneys who wish to apply for certification to represent juveniles in juvenile delinquency cases in the District and Juvenile Courts must complete the following Juvenile Delinquency Certification Application form:

*[Juvenile Delinquency Certification Application Form](#)*

The application, together with attachments, should be sent to [delcert@publiccounsel.net](mailto:delcert@publiccounsel.net).

Attorneys who wish to apply for certification to represent juveniles in juvenile delinquency cases in the District and Juvenile Delinquency Courts also must:

- i. Apply for admission into a county bar advocate program (For information on becoming a bar advocate, contact the program in the counties in which you wish to practice. A directory of these programs is available online at [www.publiccounsel.net/dir/bar-ad-offices/](http://www.publiccounsel.net/dir/bar-ad-offices/). No attorney may be a member of more than two bar advocate programs, except attorneys certified as bilingual by the Committee);
- ii. Be accepted onto the panel of attorneys of a county bar advocate program;
- iii. Complete a required training program to represent adults in criminal matters in the district courts;
- iv. Provide at least one year of high-quality trial advocacy on behalf of adults charged with criminal offenses in the district courts (or other comparable practice experience), demonstrating full compliance with all relevant Performance Standards (see [Chapter 4](#) of the CPCS Assigned Counsel Manual);
- v. Take eight (8) hours of approved juvenile-specific training within 12 months of application for Juvenile Delinquency certification, in addition to any other annual jury skills training or other CPCS CLE requirements;
- vi. Demonstrate a commitment to juvenile defense; and
- vii. Demonstrate a familiarity with the specifics of juvenile justice, including, among other things, adolescent brain development, DYS, DCF, school issues, Administrative hearings, DYS treatment plans, etc.

Initial juvenile delinquency certification is provisional, subject to performance evaluation by the county bar advocate program conducted within 12 to 24 months. The evaluation will include file review of cases prepared for trial, and cases of clients in custody. Cases will be selected for review by the Juvenile Supervising Attorney conducting the evaluation. The certification determination will be based upon evidence of compliance with all relevant Performance Standards set out in the CPCS Assigned Counsel Manual in [Chapter 4](#), with particular attention to:

- i. Prompt, consistent, and meaningful client communication;
- ii. Pretrial preparation, including witness interviews and appropriate use of investigators and experts;
- iii. Legal research and filing of memoranda of law;
- iv. Conduct of trials and litigation of substantive motions;
- v. Cooperation with Juvenile Supervising Attorney, Resource Attorney and/or Mentor; and
- vi. Lack of substantiated complaints.

Upon successful completion of the initial probationary certification, the attorney may be certified for a term of up to 5 years, after which the attorney may seek recertification.

#### **b. Maintaining Juvenile Delinquency Certification**

Attorneys who wish to maintain their juvenile delinquency certification must fulfill an annual training and educational requirement of at least eight (8) hours of juvenile- specific CLE's in addition to compliance with all District Court requirements.

Maintenance of the attorney's juvenile delinquency certification is also contingent upon evidence of compliance with all [Juvenile Delinquency Performance Standards](#) set out in the CPCS Assigned Counsel Manual in [Chapter 4](#), with particular attention to:

- i. Prompt, consistent, and meaningful client communication;
- ii. Pretrial preparation, including witness interviews and appropriate use of investigators and experts;
- iii. Legal research and filing of memoranda of law;
- iv. Conduct of trials and litigation of substantive motions;
- v. Cooperation with Juvenile Supervising Attorney, Resource Attorney and/or Mentor; and
- vi. Lack of substantiated complaints.

**c. Certification Restrictions**

Juvenile Delinquency certified Attorneys are eligible to represent clients in juvenile delinquency proceedings in the Juvenile Courts and the juvenile session of District Courts, except for potential Youthful Offender matters (see [below](#)). Attorneys may also represent indigent juveniles charged with potential Youthful Offender matters in the Juvenile Courts and juvenile sessions of the District Courts **for arraignment and bail hearings only**. If the attorney is not Youthful Offender certified, s/he must immediately notify the client, court and the Bar Advocate Program of the need for prompt reassignment of a potential Youthful Offender case after the arraignment.

Dangerousness hearings under G. L. c. 276, § 58A are considered substantial proceedings in the case, requiring the same certification as the case in chief. **Dangerousness hearings in potential Youthful Offender cases must be handled by Youthful Offender certified attorneys only**. If a dangerousness hearing in a potential Youthful Offender case is requested by the prosecutor, assigned counsel lacking certification to handle the case in chief should request a brief continuance and immediately notify the Bar Advocate Program to promptly reassign the case.

Potential Youthful Offender matters involve defendants under the age of 18 (including children too young to be indicted) on the date of the alleged offense, who are either:

- i. charged with an offense included in the CPCS list of presumptive Youthful Offender matters (see below, under [Youthful Offender Certification](#)) regardless of whether the prosecutor obtains an indictment; or
- ii. charged with any other offense, and the prosecutor indicts the juvenile.

If the juvenile (under age 18 – including children too young to be indicted) is charged with an offense on the CPCS Presumptive Youthful Offender list, **regardless of whether the prosecutor seeks to indict the juvenile**, then a juvenile delinquency certified attorney may represent the client at the arraignment only. The attorney must immediately notify the client, court and local bar advocate program to promptly assign a Youthful Offender attorney who will represent the client after the arraignment.

If the juvenile (under age 18) is charged with an offense not included in the CPCS Presumptive Youthful Offender list, and the prosecutor obtains an indictment, the juvenile delinquency certified attorney may represent the client only until the indictment is obtained. Once the juvenile is indicted, the attorney must immediately notify the client, court and local bar advocate program to promptly assign a Youthful Offender attorney who will represent the client after the post-indictment arraignment. Separate certification is required to handle CRA, care and protection, and termination of parental rights cases

(see CAFL certification sections of this chapter regarding these cases, section [F](#) and [G](#)).

**d. Assignment of Cases**

Juvenile Court and District Court cases are assigned through the county bar advocate programs.

**e. Performance Requirements**

Attorneys who accept assignment on juvenile delinquency cases must represent their clients at all stages of the delinquency proceeding in the Juvenile and District Court.

In the event of a final conviction in the Juvenile Jury Session or the District Court Jury of Six Session, it is the responsibility of the trial attorney to file a Notice of Appeal and Motion to Withdraw and to notify CPCS of the need for appellate counsel to be appointed.

Attorneys are required to represent clients committed to DYS at the Staffing and the Regional Review Team (RRT) meetings.

By accepting juvenile delinquency cases, attorneys agree to abide by the [CPCS Performance Standards Governing Representation of Juveniles in Delinquency Cases](#), which are found in this manual at [Chapter 4](#), and are available online at [www.publiccounsel.net](http://www.publiccounsel.net).

**2.YOUTHFUL OFFENDER PROCEEDINGS**

Attorneys who wish to accept assignments in Youthful Offender cases must (1) meet the minimum requirements, and (2) apply and be accepted to the panel.

**a.Minimum Requirement:**

Applicants who meet the criteria described in any one of the following six categories are eligible to apply to the Chief Counsel for approval for Youthful Offender cases. To apply, the applicant must:

- i. Be certified by CPCS to accept murder cases and have juvenile delinquency experience; OR
- ii. Meet the minimum requirements for certification for murder cases (outlined in this manual) and have juvenile delinquency experience; OR
- iii. Be certified by CPCS to accept Superior Court cases and have significant juvenile delinquency experience; OR

- iv. Meet the minimum requirements for certification for Superior Court cases ([outlined in this manual](#)) and have significant juvenile delinquency experience; OR
- v. Have tried at least five Jury of Six or Superior Court criminal and/or juvenile delinquency jury trials to verdict in the last five years as lead counsel and have significant juvenile delinquency experience; OR
- vi. Have other significant experience which demonstrates qualification to accept Youthful Offender assignments and demonstrates familiarity with the practice and procedures in the Massachusetts juvenile and criminal courts.

**b. Application Procedure:**

Attorneys seeking Youthful Offender assignments should complete and submit the following form, together with all requested information as outlined in the application form:

[\*Youthful Offender Certification Application Form\*](#)

The application, together with attachments, should be sent to [yocert@publiccounsel.net](mailto:yocert@publiccounsel.net).

The Deputy Chief Counsel, or their designee, shall notify the applicant when a decision has been made.

Certification for Youthful Offender assignments is valid for a term of up to 3 years, after which each attorney may seek recertification. Eight (8) hours per year of relevant legal education are required to maintain this certification.

**c. Certification:**

Attorneys certified for Youthful Offender cases may accept assignments in the following cases:

For the specific charges listed below, if the defendant was under the age of 18 (**including children too young to be indicted**) on the date of the alleged offense, only attorneys who are certified for Youthful Offender cases may be assigned to these cases, **regardless of whether the prosecutor intends to indict** the defendant.

**CPCS Presumptive Youthful Offender Charges:**  
**(ALL Require YO Certification)**

For a current list of presumptive Youthful Offender charges, consult the following link: [Presumptive YO Charges](#).

The above enumerated charges require assignment of a Youthful Offender attorney, REGARDLESS of the age of the juvenile, and REGARDLESS of the prosecutor's assurance that s/he will not indict the juvenile.

Attorneys who are not Youthful Offender certified, but who are juvenile delinquency certified, may accept assignment of the above listed cases FOR ARRAIGNMENT ONLY. Delinquency certified attorneys must **immediately notify the court and the bar advocate program** that the attorney can only represent the client at arraignment. The delinquency attorney **must also explain this to the client**, and explain that assignment of a Youthful Offender certified attorney will be made immediately after the arraignment. The attorney should give the client the attorney's contact information, so that the client can call the attorney if the juvenile doesn't hear from successor YO counsel. The delinquency attorney should then contact the court and Bar Advocate Program to ensure the immediate assignment of counsel.

**ALL OTHER DELINQUENCY CASES:** Attorneys who are certified to handle juvenile delinquency cases can handle all other delinquency cases NOT LISTED as Presumptive Youthful Offender Charges **until** the prosecution indicts the defendant as a Youthful Offender. **At that time**, if the attorney is not Youthful Offender certified, s/he must withdraw from the case, immediately notify the client, court, and bar advocate program, and a Youthful Offender attorney must be immediately assigned to the case.

**d. Assignment of Cases:**

Youthful Offender certified attorneys may be assigned Youthful Offender cases in Juvenile Court and in the juvenile session of the District Court as bar advocate duty attorneys or may receive assignments from bar advocate programs immediately after arraignments handled by bar advocate duty attorneys who are not Youthful Offender certified.

**e. Performance Requirements:**

Attorneys who accept assignment on Youthful Offender cases must represent their clients at all stages of the proceeding in the Juvenile/District Court in accordance with the Performance Standards.

In the event of a final conviction, it is the responsibility of the trial attorney to file a Notice of Appeal and Motion to Withdraw and to notify CPCS of the need for appellate

counsel to be appointed.

The trial attorney must also attend the staffing and Regional Review Team meetings for clients committed to DYS.

By accepting Youthful Offender cases, attorneys agree to abide by the [CPCS Performance Standards Governing Representation of Juveniles in Delinquency and Youthful Offender Cases](#), and the [CPCS Performance Standards Governing Representation of Clients in Criminal Trial Cases](#), which are found in this manual at [Chapter 4](#), which is available online at [www.publiccounsel.net](http://www.publiccounsel.net).

### **3. DYS REVOCATION OF GCL PROCEEDINGS**

Attorneys who wish to accept revocation cases must (1) be accepted onto the Revocation Advocacy Panel; and (2) complete a required training program. For information on joining the Revocation Advocacy Panel, contact the Revocation Advocacy Coordinator of the Youth Advocacy Department.

#### **a. Training Requirement:**

The initial training requirement is satisfied by attendance at a two day seminar, Revocation Advocacy Practice and Procedures. The program is administered through the Youth Advocacy Department several times per year.

Beyond the initial training, four (4) hours of juvenile-specific CLE's as well as two (2) hours of additional revocation-specific training offered by the Youth Advocacy Department, are required within twelve months of acceptance onto the panel.

CLE certificates or proofs of attendance must be filed with the Revocation Advocacy Coordinator of the Youth Advocacy Department in order to count towards certification.

#### **b. Initial Certification:**

Attorneys who complete the training requirement are certified to represent juveniles facing revocation.

Initial certification is provisional, subject to performance evaluation by the Revocation Advocacy Coordinator conducted within twelve months. The evaluation will include file review of cases as well as observation of hearings. Cases will be selected for review

by the Revocation Advocacy Coordinator. The certification determination will be based upon evidence of compliance with relevant Performance Standards set out in this manual at [Chapter 4](#), with particular attention to:

- i. adherence to on-duty protocols and responsibilities;
- ii. prompt and consistent client communication;
- iii. comprehensiveness of hearing preparation;
- iv. quality of written appeals;
- v. zealous advocacy during hearings;
- vi. cooperation with the Revocation Advocacy Coordinator and fellow panel attorneys; and
- vii. lack of substantiated complaints.

**c. Recertification:**

Attorneys who wish to remain on the Revocation Advocacy Panel must have fulfilled within the previous twelve months an annual training and educational requirement of at least four (4) hours of YAD-approved, juvenile-specific CLE's, as well as four (4) hours of revocation-specific training offered by the Youth Advocacy Department. This total does not include the initial panel certification training.

Additionally, attorneys will be annually reviewed within twelve months of recertification application. The evaluation will include file review of cases as well as observation of hearings. Cases will be selected for review by the Revocation Advocacy Coordinator. The certification determination will be based upon evidence of compliance with relevant Performance Standards set out in this manual at [Chapter 4](#), with particular attention to:

- i. adherence to on-duty protocols and responsibilities;
- ii. prompt and consistent client communication;
- iii. comprehensiveness of hearing preparation;
- iv. quality of written appeals;
- v. zealous advocacy during hearings;
- vi. cooperation with the Revocation Advocacy Coordinator and fellow panel attorneys; and
- vii. lack of substantiated complaints.

**d. Assignment of cases:**

Attorneys maintain duty weeks and a centralized regional duty calendar. Cases are assigned to the on-duty attorney through DYS when youth are returned to custody.

**e. Performance Requirements:**

Attorneys who accept revocation cases must represent their clients at all stages of the revocation process. In addition to hearing representation, this may include preparation for and representation at a DYS “Regional Review Team” meeting, as well as preparation and submission of a hearing decision appeal.

By accepting assignments of revocation cases, attorneys agree to abide by the [CPCS Performance Standards Governing Representation of Juveniles in Revocation Proceedings](#), which are found in this manual at [Chapter 4](#), and are available online at [www.publiccounsel.net](http://www.publiccounsel.net).

**4. JUVENILE PAROLE HEARINGS**

**a. Right to Representation**

On March 23, 2015, the Supreme Judicial Court held that “parole eligibility is an essential component of a constitutional sentence under article 26 for a juvenile homicide offender subject to mandatory life in prison.” *Diatchenko (II)*. Historically, there is no constitutionally protected liberty interest in a grant of parole. See *Greenholtz v. Neb.* 442 U.S. 1, 7 (1979). However, in the context of juvenile lifers, the Supreme Judicial Court determined that a meaningful opportunity for release through parole is necessary to comply with the requirements of article 26. Accordingly, the Court determined that, for this cohort, the parole process takes on constitutional dimensions that do not exist for other offenders. Thus, the Court required the appointment of counsel for parole hearings, access to funds for expert witnesses, and the availability of judicial review of decisions denying parole release.

The purpose of this Juvenile Parole Panel is to ensure that each juvenile homicide offender is afforded “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Diatchenko II*.

Effective juvenile parole representation requires not only knowledge of relevant case law and the recognized science of brain maturation and its impact on adolescent behavior, but also effective and prompt case preparation, including investigation, intensive client preparation, and parole release planning. Moreover, advocates must also be knowledgeable about other collateral issues that may arise including, but not limited to, interstate compact, immigration status, mental health issues, and sex offender registration.

The CPCS Youth Advocacy Division will provide the necessary training, technical assistance, supervision, and oversight to the panel. This specialization and certification will significantly improve the access to, and quality of, parole representation in Massachusetts.

In recognition of the increased range of skills, experience, and knowledge necessary for effective representation of prisoners now eligible for parole release, all current panel members are required to apply for recertification. Recertification will then occur once every three years.

**b. Certification Standards**

The following criteria will be considered in assessing a candidate's suitability for the Juvenile Parole Representation Panel:

*i. Attorney Background and Relevant Professional Practice*

The following will be considered:

- (a) Youthful Offender and/or Superior Court and/or Murder certification;
- (b) Contribution to Panel Diversity, including geographic diversity; Specific Client and/or Panel needs;
- (c) Continuity of service;
- (d) Non-English Language proficiency;
- (e) Organizational skills;
- (f) Possession of other skills and experience relevant to specific panel practice;
- (g) Community engagement or involvement that contributes to effective representation;
- (h) Outstanding references;
- (i) Demonstrated commitment to indigent population;
- (j) Academic background indicating strong potential to provide high quality representation;
- (k) Attorney's Office: private setting, geographic proximity to clients and court;
- (l) Attorney's legal research service/ electronic legal library;
- (m) Appellate certification and/or experience;
- (n) Investigative skills;
- (o) Administrative law experience;
- (p) Other CPCS panel certifications;
- (q) For each panel, practice in that field with sufficient regularity to build, maintain, and ensure:

- (1) Expertise in the particular practice area of law;
- (2) Familiarity with, and mastery of the use of resources, experts, and community services;
- (3) Successful and effective working relationships with the parole board, judges, other attorneys, court personnel;
- (4) Familiarity with specific parole culture and associated court practice.

Waiver of the above listed criteria may be made for good cause shown.

***ii. Attorney-Client Relationship & Communication***

The Attorney must be respectful, responsive, supportive, and sensitive to the client's needs and wishes; and builds and maintains positive and effective relations with clients, demonstrated by the following:

- (a) Prompt, consistent, and timely in-person interviews and discussions with clients. Appropriate requests for out-of-state travel;
- (b) Attorney treats clients with dignity, and provides a private, quiet and safe/neutral setting, allocating sufficient time to enable the clients to communicate openly and frankly; Communication recognizing and accommodating the particular needs and capabilities of the clients;
- (c) Attorney keeps clients fully informed throughout representation;
- (d) Attorney gives clients opportunity for complete input throughout representation;
- (e) Participation in key client interviews;
- (f) Participation in key collateral meetings;
- (g) Thorough, timely, appropriate, and thoughtful preparation of clients for all hearings, recognizing the requirement of intensive client preparation for parole hearings;
- (h) Prompt appearance for clients at all appointments, pre-hearing interviews, and scheduled hearing dates;
- (i) Client contact and preparation consistent with CPCS Performance Standards;
- (j) Meaningful and appropriate use of interpreters;
- (k) Lack of substantiated complaints from clients or others, particularly re: client contact or explanation of process and options;
- (l) Ability to accept collect calls, and office hours when attorney is available to accept calls.

***iii. Advocacy Skills***

The Attorney must be a highly skilled litigator and advocate for his/her client,

providing prompt, thorough, and zealous performance at all stages of the case, including anticipation of potential issues and solutions, and effective interactions with all individuals relevant to the case, as demonstrated by:

- (a) Superior written and oral communication skills;
- (b) Full compliance with all CPCS Performance Standards, including the following:

(1) Hearing preparation, including:

- i. Thorough and timely investigation of each case;
- ii. Skilled use of, and thorough preparation of experts as needed and appropriate, including investigators, social workers, psychologists, and interpreters;
- iii. Skilled and effective superior court appeals practice.

(2) Zealous and skillful advocacy at all parole hearings, including:

Excellent preparation and execution of parole hearing plan including production of a comprehensive memo that includes facts of the crime, cognitive, social and emotional development of client at the time of crime, institutional history including disciplinary reports and rehabilitative programs, and reentry plan;

- i. Highly skilled and agile formation and execution of arguments, openings, closings in support of client's arguments for release;
- ii. Skilled preservation of the record and of appellate rights, including timely filing of Notices of Appeal, and full cooperation with appellate counsel.

(3) Rate of Success/Results

*iv. **Professional Responsibility***

The Attorney must be highly professional, prepared, punctual, efficient, and reliable; is well-organized, keeps abreast of current law, and is scrupulous in adhering to all CPCS Performance Standards and Policies, as well as requirements of the Rules of Professional Conduct, including:

- (a) Commitment to developing, maintaining, and improving professional skills, evidenced by active participation in CLEs, as faculty, panel member, or attendee;
- (b) Regular consultation with mentors, resource attorneys, supervising attorneys,

and regional coordinators, and efforts to seek CPCS assistance where appropriate;

- (c) Performance in skills trainings, including awards and honors, indicating strong potential to provide high quality representation;
- (d) Consistency in meeting obligations to clients and assigned counsel program, and compliance with CPCS published performance standards and policies, including billing and record-keeping policies;
- (e) Attorney has consistently completed ebill “closed” case and disposition forms in a timely manner for all closed cases;
- (f) Lack of billing or audit issues;
- (g) Lack of substantiated complaints by clients, courts, attorneys, or others;
- (h) Lack of history of complaints/disciplinary action from CPCS, the BBO, the Bar Advocate Programs, clients, or others;
- (i) Lack of history or incidence of misconduct indicating a risk to assigned clients or others.

v. **Parole Panel Eligibility Considerations**

(a) Application Procedure

Attorneys seeking Parole assignments should complete and submit the following form, together with all requested information as outlined in the application form:

[Parole Certification Application Form](#)

The application, together with attachments, should be sent to the Director of the Juvenile Parole Panel.

The Director of the panel, or his or her designee, shall notify the applicant when a decision has been made.

Certification for juvenile parole assignments is valid for a maximum term of 3 years, after which each attorney may seek recertification.

(b) Maintaining Parole Certification

Attorneys who wish to maintain their juvenile parole certification must fulfill an annual training and educational requirement of at least eight (8) hours of CLE’s through one or more approved continuing education seminars.

(c) Maintenance of the attorney’s juvenile parole certification is also contingent

upon evidence of compliance with all Juvenile Parole Performance Standards, including:

- (1) Prompt, consistent, and meaningful client communication;
  - (2) Hearing preparation, including witness interviews and appropriate use of investigators and experts;
  - (3) Legal research and filing of memoranda of law;
  - (4) Conduct of hearings;
  - (5) Pursuit of administrative, Superior Court, and SJC appeals, as appropriate to each case;
  - (6) Lack of substantiated complaints.
- (d) Assignment of Cases and Scope of Representation

Juvenile Parole attorneys will be assigned by the Committee for Public Counsel Services at least one year prior to the Defendant's parole release date. Representation will continue until all appeals have been exhausted or until the prisoner who received a positive parole decision is released.

- (e) Performance Requirements

Attorneys who accept assignment on juvenile parole cases must represent their clients at all stages of the parole proceedings, including appeals.

By accepting juvenile parole cases, attorneys agree to abide by the [CPCS Performance Standards Governing Representation of Clients in Juvenile Parole Proceedings](#), which can be found in this manual, and are available online at [www.publiccounsel.net](http://www.publiccounsel.net).

## **D. JUVENILE APPEALS AND OTHER POST-TRIAL MATTERS**

### **1. Certification to Take Juvenile Appellate Assignments**

The Youth Advocacy Division is committed to providing our clients with excellent appellate advocates who are dedicated to building a strong professional relationship with each client, understanding their diverse circumstances, and meeting their needs within the appellate process and outside the legal system. YAD strives to meet these goals by recruiting and maintaining a diverse and inclusive panel of private attorneys who represent a broad range of human difference and experience.

To qualify for the juvenile appellate panel, counsel must be a member in good standing of the Massachusetts bar and:

1. Possess demonstrated proficiency in legal research and writing; and
2. Possess at least one of the following:
  - a. One year of trial experience with adult criminal defense, delinquency, youthful offender, juvenile murder, Children and Family Law, SORB, SDP or Mental Health litigation; or
  - b. Primary authorship of one or more thoroughly researched and well written appellate briefs; or
  - c. A recent judicial clerkship, substantial editing experience for a law journal, primary or ancillary authorship of a law journal article, or other substantial legal research and writing experience; or
  - d. Other relevant life or legal experience that has provided the applicant with a unique or personal perspective on juvenile defense work.

Acceptance onto the juvenile appellate panel is on a provisional basis. Once accepted onto the juvenile appellate panel, the attorney must successfully complete the next available certification training and the YAD Appeals mentor program to become a permanent member. The Director of Juvenile Appeals (Director) may grant a waiver of the mentor requirement in some circumstances. Unless such a waiver is granted, the attorney must successfully complete the mentor program to become a permanent member of the panel.

Provisional certification may be revoked at any time for reasons such as failure to comply with mentoring protocols and deficient performance relative to the performance standards Governing Representation of Clients in Juvenile Appeals and Other Post-Trial Matters.

Attorneys certified for juvenile appellate assignments may receive assignments in juvenile delinquency and youthful offender appeals, screenings for collateral motions (new trial, relief from unlawful restraint, revise and revoke), sentencing appeals and other post-adjudication matters. An additional certification process is required to receive juvenile murder appeals and screenings.

## **2. Application Process**

The applicant must submit the following documents:

- a. A completed application prior to the next certification training;
- b. A current resume;
- c. Two legal writing samples totaling no more than 100 pages, of which the applicant is the primary author. If the applicant does not have two samples of primary authorship, one jointly authored sample may be included provided the following are clearly identified: the name and level of involvement of other attorneys; the portions the applicant wrote; and whether anyone edited the portions written by the applicant. Writing samples concerning criminal or delinquency law are preferred but not required. Court investigator or GAL or other similar reports will not be accepted.

- d. In addition, the applicant must submit three professional references that are familiar with the applicant's abilities in legal research and writing, and trial experience and/or appellate practice in adult criminal, juvenile delinquency/youthful offender, juvenile murder, Children and Family Law, SORB, SDP or Mental Health law. References familiar with the applicant's experience working with adolescent clients are preferred but not required.

### **3. Performance Standards**

By accepting assignments in juvenile appellate and post-trial matters, attorneys agree to comply with all applicable CPCS Performance Standards, including the Performance Standards Governing Representation of Clients in Juvenile Appeals and Other Post-Trial Matters.

### **4. Training Program**

Applicants are required to complete a comprehensive certification training that covers topics including but not limited to: adolescent development, positive youth development, client relationship building as well as communication with parents and guardians, the screening process, the performance standards and the appellate process.

### **5. Annual Requirements**

Attorneys who wish to maintain their juvenile appellate certification must:

- a. Comply fully with the Performance Standards Governing Representation of Clients in Juvenile Appeals and Other Post-Trial Matters, the Assigned Counsel Manual, the CPCS Court Cost Vendor manual, and the Massachusetts Rules of Professional Conduct;
- b. Remain in good standing with the Board of Bar Overseers;
- c. Remain in good standing with any other CPCS panel(s) for which counsel is certified.
- d. Complete eight hours of CPCS-approved continuing legal education credits per fiscal year (July 1-June 30). The eight hours of credits must include at least two trainings presented by YAD (trainings "presented by YAD" comprise trainings organized by YAD and approved trainings sponsored by community-based juvenile-justice organizations")
- e. Accept at least one direct appeal every two fiscal years, subject to waiver or extension as granted by the Director;
- f. Accept at least one screening assignment upon completion of certification training and every two fiscal years thereafter, subject to waiver or extension as granted by the Director;
- g. Provide YAD Appeals with a .pdf of all appellate briefs and collateral motions when filed;
- h. Maintain regular client contact as required by the performance standards;
- i. Immediately notify the Director of receipt of any notices regarding dismissals pursuant to M.A.C. Rule 19 and comply with any request for information regarding

- such dismissals;
- j. Comply with any complaint allegation investigation; and
- k. Comply with any additional performance-related requirement as a result of any complaint investigation.

Failure to satisfy these requirements may result in removal from the panel.

## **E. APPEALS & OTHER POST-CONVICTION MATTERS**

### **1. CERTIFICATION TO TAKE POST-CONVICTION ASSIGNMENTS**

To qualify for the post-conviction panel, counsel must be a member in good standing of the Massachusetts Bar with substantial experience in criminal law or appellate practice, must undertake a training process, and must agree to work with an appellate mentor for the first few assignments. The training requirement must be completed after the applicant has been approved for post-conviction certification. Acceptance onto the post-conviction panel is on a provisional basis. To become a permanent member of the panel, the attorney must successfully complete the mentor program.

Attorneys certified for appeals and post-conviction assignments may receive assignments in criminal appeals, new trial motions, motions for relief from unlawful restraint, motions to revise and revoke, sentence appeals, and other post-conviction matters.

### **2. APPLICATION PROCESS**

The applicant should submit a letter to the Director of Criminal Appeals describing the applicant's interest in handling criminal appeals and explaining why the applicant's experience, training, and education qualifies the applicant for appeals and post-conviction assignments and how the applicant intends to incorporate post-conviction assignments into the applicant's current practice. A current resume should be included.

Two legal writing samples should be submitted, preferably at least one of which addresses a criminal law issue. The applicant should include the names and addresses of two references who are familiar with the applicant's abilities in legal research and writing, criminal law, and/or appellate practice.

The above package should be sent by e-mail attachment to:

Elizabeth Dembitzer  
Director of Criminal Appeals  
75 Federal Street  
Boston, MA 02110  
617-910-5830

### 3. PERFORMANCE STANDARDS

By accepting CPCS-assigned cases, attorneys agree to abide by the [Performance Standards Governing the Representation of Clients on Criminal Appeals and Post- Conviction Matters](#). A copy of these Performance Standards is provided with the acceptance letter and can be found in this manual in [Chapter 4](#).

### 4. TRAINING PROGRAM

Applicants are required to attend a one-half day training program, which covers the appellate process, record assembly, client relations, and the performance standards. New panel members must also participate in a one-day writing workshop at CPCS. The training program requirements must be fulfilled at the earliest opportunity after the applicant has been accepted onto the post-conviction panel.

## F. MENTAL HEALTH PROCEEDINGS

### 1. TRIAL CERTIFICATION

In order to obtain certification to accept assignments in mental health proceedings (*e.g.*, civil commitments, guardianships, "Rogers" cases, "extraordinary treatment" cases), an attorney must [apply for admission](#) into the program. At least one year of litigation experience, preferably in mental health proceedings, is typically required. If accepted, he or she must attend the two-part training program described below and then successfully complete a [mentorship program](#). During an attorney's participation in the mentorship program, he or she will be provisionally certified.

#### Part 1: "Mental Health Proceedings and Advocacy for Assigned Counsel"

A comprehensive five-day review of substantive mental health law and the procedural rules applicable in mental health proceedings. Conducted from a defense perspective, emphasis is placed upon litigation technique and strategy. [Sponsored by CPCS. Written material: Larsen, M., Goldman, S., et al., *Mental Health Proceedings in Massachusetts: A Manual for Defense Counsel*. See [training schedule](#) for next session.]

#### Part 2: "Clinical Aspects of Mental Illness and Treatment"

An overview of the clinical perspectives on the diagnosis and treatment of mental illness, with an emphasis on those issues typically raised in mental health proceedings (*e.g.*, the prediction of dangerousness, capacity to make decisions, treatment with antipsychotic medication). [Sponsored by CPCS. Instructors: Various clinical experts. Written material: Selected articles by the faculty and others. See [training schedule](#) for next session.]

In order to maintain mental health certification, attorneys must attend at least eight (8) hours of [approved continuing legal education programs](#) in each fiscal year (*i.e.*, 7/1 - 6/30). Written materials are developed for each program by the respective faculty.

Further, attorneys are expected to maintain an active mental health practice. To that end, in order to maintain certification, an attorney must accept at least five (5) new mental health assignments in each fiscal year.

Membership in the [Mental Health Litigation Division E- Group](#) also is required.

Note: Attorneys who represent institutional petitioners in mental health proceedings may not obtain CPCS Mental Health Certification, nor participate in the Mental Health Litigation Division E-Group.

## **2. APPELLATE CERTIFICATION**

In order to accept mental health appellate assignments, an attorney must be certified to accept mental health assignments, described above, must [apply for admission](#) to the appellate panel, and must then complete a training program entitled "Appellate Advocacy and Procedure in Civil Cases." [Sponsored by CPCS]. Faculty are experienced mental health and appellate counsel. Written materials are developed for each program by the faculty. See [training schedule](#) for next session. Thereafter, mental health certification must be maintained, as described above.

Because mental health appellate certification trainings are offered less frequently than mental health certification trainings, attorneys with prior appellate experience who are members in good standing of the mental health panel may apply for mental health appellate certification by waiver. Applications for appellate certification by waiver shall follow the waiver procedures set forth at [Chapter 3 Section K](#) of this manual generally, and shall include submission of a letter of interest, resume, list of prior appeals with full case names and docket numbers, and copies of two appellate briefs that have been filed by the applicant.

## **3. PROVISIONAL CERTIFICATION**

The Mental Health Litigation Division assigns mentors to attorneys who complete the certification training. Attorneys are provisionally certified during the period of their mentorship. Provisionally-certified attorneys must work cooperatively with their assigned mentors. Mentors will update the Division's Assistant Director about the work of each of their attorneys throughout the mentoring period. With input from the mentor, the Assistant Director determines whether and when the attorney has successfully completed the mentoring program. When the Assistant Director determines that the provisionally-certified attorney no longer requires a mentor, the attorney will be fully certified and permitted to take

additional trial court assignments without mentor supervision. Provisional certification may be revoked at any time for reasons including but not limited to: failure to comply with mentoring protocols, failure to make sufficient progress toward full certification, or deficient performance relative to the performance standards for mental health proceedings.

#### **4. ASSIGNMENT OF CASES**

Assignments of all matters arising under G.L. c. 123 (*i.e.*, involuntary admissions pursuant to G.L. c. 123, § 12(b), commitments and authorization to treat committed persons) in the District, Boston Municipal Court and Superior Court Departments are made by the Mental Health Litigation Division on a rotating basis from lists of mental health-certified trial attorneys who wish to accept assignments in particular Divisions within these Departments. Due to the time-sensitive nature of these assignments, the first attorney who responds as available to accept the appointment will generally be assigned. Occasionally, assignments will be made based on particular needs of the client, case, or circumstances. Assignments which deviate from the usual rotation may be made by the Division on the same bases as those generally used by the Probate Courts. These include: appointee has particular expertise in the subject matter; candidate for successive appointment is unavailable for expedient disposition; appointee represents this party in another matter that is pending; appointee has represented this party on prior occasions; candidate for successive appointment has a conflict of interest; appointee has relevant foreign language skills; candidate for successive appointment could not be reached by telephone number on the list.

Assignments in the Probate Court Department in guardianship proceedings are made by the courts on a rotating basis from lists of mental health-certified trial attorneys who wish to accept assignments in the particular Divisions of the Department. These lists are provided to the courts by the Mental Health Litigation Division.

Assignments in mental health appeals are made by the Mental Health Litigation Division on a rotating basis from the list of mental health appellate-certified attorneys. Assignments which deviate from the usual rotation may be made by the Division on the same bases as those generally used by the Probate Courts. Specifically, these include: appointee has particular expertise in the subject matter; candidate for successive appointment is unavailable for expedient disposition; appointee represents this party in another matter that is pending; appointee has represented this party on prior occasions; candidate for successive appointment has a conflict of interest; appointee has relevant foreign language skills; candidate for successive appointment could not be reached by telephone number on the list.

Effective October 1, 2013, mental health assignments will be restricted to the county in which your office is located and abutting counties, with the following exceptions:

- a. Assignments in an abutting county shall not be in excess of 45 miles (one-way) from your office to the applicable courthouse: and
- b. If your office is located in Berkshire, Franklin, Hampshire or Hampden County, you will be permitted to accept assignments throughout all such counties.

## **G. CHILDREN AND FAMILY LAW PROCEEDINGS**

### **1. CHILDREN AND FAMILY LAW (CAFL) REPRESENTATION AT THE TRIAL LEVEL IN CASES ARISING UNDER G.L. C. 119**

Except as provided in [subsection 3](#), attorneys who wish to accept CAFL assignments from the Trial Court in proceedings brought under G.L. c. 119 (including guardianship of minor proceedings brought in conjunction with the c. 119 case in the same court) must

- (1) apply for admission to the Children and Family Law (CAFL) trial panel; (2) successfully complete all required trainings; (3) work with a mentor assigned by CAFL; and (4) attend eight hours of CAFL-approved continuing legal education each fiscal year.

#### **a. Application Procedure**

Attorneys who wish to accept CAFL assignments from the Trial Court under G.L. c. 119 (including guardianship of minor proceedings brought in conjunction with the c. 119 proceeding in the same court) must submit an application for the CAFL trial panel certification program. Certification training programs take place periodically and are announced on CPCS's website at [www.publiccounsel.net/cafl/training/](http://www.publiccounsel.net/cafl/training/). Instructions on how to apply accompany each announcement. Preference is given to attorneys who have an established practice, experience working with families, and litigation skills. Attorneys will be notified if they are accepted into the training program.

#### **b. Training Requirements**

**Initial Certification:** Attorneys accepted into the training program must attend the initial multi-day program and all subsequent sessions. Applicants with significant trial experience may apply for a waiver of the trial skills portion of the training. The program is administered through Massachusetts Continuing Legal Education (MCLE) and is usually offered two times each year. Newly-certified CAFL trial panel attorneys must attend a 4-hour seminar, "Medical Treatment Decisions for Children in DCF Custody," and a 2-day trial practice training sponsored by CPCS, within two years of the completion of the Certification training. These seminars are offered once or twice a year.

**Annual Requirements:** Trial panel attorneys must complete 8 hours of CAFL-approved continuing legal education each fiscal year. The fiscal year begins on July 1 and concludes on June 30. Trial panel attorneys are required to satisfy the annual continuing education requirement beginning in the fiscal year after they successfully complete the CAFL Trial Panel Certification Training Program.

Continuing legal education is available at CAFL-sponsored trainings throughout the Commonwealth, MCLE, the CPCS Annual Training, and other approved seminars. A list of approved seminars is available on the CPCS web site, [www.publiccounsel.net](http://www.publiccounsel.net). To obtain approval for attending a program that is not on the list, attorneys must submit a request for approval (including a comprehensive description of the program, its length and a syllabus describing its contents and faculty) to the CAFL Training Director. Attorneys are urged to seek approval prior to attending such programs.

Attorneys must mail or email their CLE certificates or proofs of attendance to the CAFL Certification Coordinator (CPCS, 75 Federal Street, Boston, MA 02110 or [rcaso@publiccounsel.net](mailto:rcaso@publiccounsel.net)) on or before July 15 of each fiscal year.

Attorneys who are certified for both the CAFL trial and appellate panels need only take a total of 8 hours of approved CLEs each fiscal year.

**c. Assignment of Cases**

The CAFL Division provides the Juvenile, District, and Probate and Family Courts with lists of CAFL-certified trial attorneys who wish to accept assignments in designated courts. Courts make assignments from these lists.

**d. Assignment Requirements**

To maintain certification, attorneys must regularly accept appointments to represent parents *and* children. Attorneys who do not satisfy this requirement may be removed from the panel at the discretion of the CAFL Trial Panel Director.

**e. Provisional Certification**

The CAFL Division assigns mentors to attorneys who satisfactorily complete the certification training. Attorneys are provisionally certified during the period of their mentorship. Provisionally-certified attorneys must work cooperatively with their assigned mentors. Mentors will update the CAFL Trial Panel Director about the work of each of their attorneys throughout the mentoring period.

The CAFL Trial Panel Director determines when the mentorship ends. If the Trial

Panel Director determines that the provisionally-certified attorney no longer requires a mentor, the attorney will be fully certified and permitted to take additional trial court assignments without mentor supervision. At any time during the provisionally-certified attorney's mentorship, the Trial Panel Director may:

- i. graduate the attorney from the mentor program;
- ii. remove the attorney's certification to take new CAFL trial court assignments;
- iii. remove the attorney from the panel and have his/her cases reassigned; or
- iv. place caseload restrictions or other conditions on the attorney.

**f. Performance Requirements**

By accepting assignments in the Trial Court in CAFL cases, attorneys agree to comply with all applicable CPCS Performance Standards. The Standards are contained in [Chapter 4](#) of this manual and are available online at [www.publiccounsel.net](http://www.publiccounsel.net). Attorneys who accept CAFL trial assignments must represent their clients at all trial proceedings. Trial counsel is responsible for appellate proceedings until the CAFL Division assigns appellate counsel and appellate counsel enters an appearance. The CAFL Trial Panel Director may, at his or her discretion and when in the interests of a client, require an attorney to file a Motion to Withdraw and request the appointment of successor counsel.

**2. PROBATE AND FAMILY COURT GUARDIANSHIP OF A MINOR AND PRIVATE ADOPTION CASES**

Attorneys seeking certification to accept CAFL trial level assignments in Probate and Family Court guardianship of a minor and private adoption cases in which DCF is not a party must apply for and attend the guardianship of a minor certification program. Certification training programs take place periodically and are announced on CPCS's website at [www.publiccounsel.net/cafl/training](http://www.publiccounsel.net/cafl/training). Instructions on how to apply accompany each announcement. Preference may be given to experienced litigators with an established Probate and Family Court practice. Attorneys seeking certification to accept assignments in private adoption cases in the Probate and Family Court must also be certified under [subsection 1](#).

**3. CRA APPOINTMENTS TO REPRESENT CHILDREN ONLY**

Attorneys who are *not* currently certified to accept CAFL assignments and wish to accept assignments to represent *children* in Children Requiring Assistance (CRA) matters must (1) apply for admission to the CRA-Child Only (CRA-CO) panel; (2) successfully complete all required trainings; (3) work with a mentor assigned by CAFL; and (4) attend four hours of CAFL-approved continuing legal education each fiscal year.

**a. Application Procedure**

Attorneys seeking certification to accept CRA-CO trial level assignments must submit an application for the CRA-CO panel certification program. Certification training programs take place periodically and are announced on CPCS's website at [www.publiccounsel.net/cafl/training](http://www.publiccounsel.net/cafl/training). Instructions on how to apply accompany each announcement. Preference is given to attorneys who have an established practice, experience working with children, and litigation skills. Attorneys will be notified if they are accepted into the training program.

**b. Training Requirements**

CRA-CO attorneys must complete 4 hours of CAFL-approved continuing legal education each fiscal year. The fiscal year begins on July 1 and concludes on June 30. CRA-CO attorneys are required to satisfy the annual continuing education requirement beginning in the fiscal year after they successfully complete the CRA- CO Panel Certification Training Program.

Continuing legal education is available at CAFL-sponsored trainings throughout the Commonwealth, MCLE, the CPCS Annual Training, and other approved seminars. A list of approved seminars is available on the CPCS web site, [www.publiccounsel.net](http://www.publiccounsel.net). To obtain approval for attending a program that is not on the list, attorneys must submit a request for approval (including a comprehensive description of the program, its length and a syllabus describing its contents and faculty) to the CAFL Training Director. Attorneys are urged to seek approval prior to attending such programs.

Attorneys must mail or email their CLE certificates or proofs of attendance to the CAFL Certification Coordinator (CPCS, 75 Federal Street, Boston, MA 02110 or [rcaso@publiccounsel.net](mailto:rcaso@publiccounsel.net)) on or before July 15 of each fiscal year.

**c. Assignment of Cases**

The CAFL Division provides the Juvenile Court with lists of CAFL-certified CRA- CO attorneys who wish to accept assignments in particular courts. Courts make assignments from these lists.

**d. Assignment Requirements**

To maintain certification, attorneys must regularly accept appointments to represent children in CRA matters. Attorneys who do not satisfy this requirement may be removed from the panel at the discretion of the CAFL Trial Panel Director.

**e. Provisional certification**

The CAFL Division assigns mentors to attorneys who satisfactorily complete the certification training. Attorneys are provisionally certified during the period of their mentorship. Provisionally-certified attorneys must work cooperatively with their assigned mentors. Mentors will update the CAFL Trial Panel Director about the work of each of their attorneys throughout the mentoring period.

The CAFL Trial Panel Director determines when the mentorship ends. If the Trial Panel Director determines that the provisionally-certified attorney no longer requires a mentor, the attorney will be fully certified and permitted to take additional trial court assignments without mentor supervision. At any time during the provisionally-certified attorney's mentorship, the Trial Panel Director may:

- i. graduate the attorney from the mentor program;
- ii. remove the attorney's certification to take new CRA assignments;
- iii. remove the attorney from the panel and have his/her cases reassigned;
- or
- iv. place caseload restrictions or other conditions on the attorney.

**f. Performance Requirement**

By accepting assignments to represent children in CRA cases in the Trial Court, attorneys agree to comply with all applicable CPCS Performance Standards. The Standards are contained in [Chapter 4](#) of this manual and are available online at [www.publiccounsel.net](http://www.publiccounsel.net). Attorneys who accept CRA trial assignments must represent their clients at all trial proceedings. Trial counsel is responsible for appellate proceedings until the CAFL Division assigns appellate counsel and appellate counsel enters an appearance. The CAFL Trial Panel Director may, at his or her discretion and when in the interests of a client, require an attorney to file a Motion to Withdraw and request the appointment of successor counsel.

## **H. CHILDREN AND FAMILY LAW (CAFL) REPRESENTATION AT THE APPELLATE LEVEL (CARE AND PROTECTION, TERMINATION OF PARENTAL RIGHTS, GUARDIANSHIP, AND CRA PETITIONS)**

Attorneys who wish to accept CAFL appellate assignments must (1) apply for admission to the Children and Family Law (CAFL) appellate panel; (2) successfully complete all

required trainings; (3) work with a mentor assigned by CAFL; and (4) attend eight hours of CAFL-approved continuing legal education each fiscal year.

### **1. APPLICATION PROCEDURE**

Attorneys seeking certification to accept CAFL appellate assignments must submit an application for the CAFL appellate certification program. Applications are available on the CAFL Training section of the CPCS web site ([www.publiccounsel.net/cafl/training/](http://www.publiccounsel.net/cafl/training/)) several months before each certification training program.

Applicants must have the following minimum qualifications:

- a. Demonstrated proficiency in legal research and writing; and
- b. At least one of the following:
  - i. Two years of child welfare trial experience;
  - ii. Primary authorship of two or more appellate briefs in other subjects;
  - iii. A recent appellate clerkship, substantial editing experience for a law journal, or publication of a law journal article.

Applicants must send to the CAFL Certification Coordinator a completed application and all other documents requested there.

Attorneys will be notified if they are accepted into the training program.

### **2. TRAINING REQUIREMENTS**

#### **a. Initial Certification:**

Attorneys accepted into the certification training program must attend all three days

of the program. The certification training program is held annually, but it may be held more often at the discretion of the CAFL Director of Appellate Panel.

**b. Annual Requirements:**

Appellate panel attorneys must complete 8 hours of CAFL-approved continuing legal education each fiscal year. The fiscal year begins on July 1 and concludes on June 30. Appellate panel attorneys are required to satisfy the annual continuing education requirement beginning in the fiscal year subsequent to their completion of the three-day CAFL appellate panel certification training program.

Continuing legal education is available at CAFL-sponsored trainings throughout the Commonwealth, MCLE, the CPCS Annual Training, and other approved seminars. A list of approved seminars is available on the CPCS web site, [www.publiccounsel.net/cafl/training/](http://www.publiccounsel.net/cafl/training/). To obtain approval for attending a program that is not on the list, attorneys must submit a request for approval (including a comprehensive description of the program and a syllabus describing its contents and faculty) to the CAFL Training Director. Attorneys are urged to seek approval prior to attending such programs.

Attorneys must mail or email their CLE certificates or proofs of attendance to the CAFL Certification Coordinator on or before July 15 of each fiscal year.

Attorneys who are certified for both the CAFL trial and appellate panels need only take a total of 8 hours of approved CLEs each fiscal year.

**3. ASSIGNMENT REQUIREMENTS**

To maintain certification, attorneys must accept at least one CAFL appellate appointment during the fiscal year of the initial certification training. Thereafter, attorneys must accept at least one CAFL appellate appointment every three fiscal years. To maintain certification, attorneys must accept appointments to represent parents and children. Attorneys who do not satisfy these requirements may be removed from the panel at the discretion of the CAFL Director of Appellate Panel.

**4. CERTIFICATION AND PERFORMANCE REQUIRMENTS**

**a. Provisional Certification/Mentor Program**

The CAFL Division assigns mentors to attorneys who satisfactorily complete the certification training. Attorneys are provisionally certified during the period of their mentorship. Provisionally-certified attorneys must work cooperatively with

their assigned mentors. For each appellate assignment, the provisionally-certified attorney will send the mentor copies of the transcripts, exhibits, and key pleadings. The mentor will review these materials to help the provisionally-certified attorney identify appellate issues and research strategy. The mentor will also edit drafts of briefs prior to submission, authorize the filing of the brief, help the provisionally-certified attorney prepare for oral argument, and help the provisionally-certified attorney address other issues related to the appeal.

The CAFL Director of Appellate Panel determines when the mentorship ends. If the Director of Appellate Panel determines that the provisionally-certified attorney no longer requires a mentor, the attorney will be fully certified and permitted to take additional appellate assignments without mentor supervision. At any time during the provisionally-certified attorney's mentorship, the Director of Appellate Panel may remove that attorney's certification to take CAFL appellate assignments.

**b. Performance Requirements**

By accepting assignments for CAFL appeals, attorneys agree to comply with all CAFL trial and appellate level CPCS Performance Standards. The Standards are contained in this Assigned Counsel Manual and are available online at [www.publiccounsel.net](http://www.publiccounsel.net). Attorneys must submit unbound or PDF copies of all briefs to the CAFL Certification Coordinator. If the case is closed before briefing, the attorney must notify the CAFL Certification Coordinator of the reason the assignment is closed. The CAFL Director of Appellate Panel may, at his or her discretion and when in the interests of a client, require an appellate attorney to file a motion to withdraw from a case and/or remove an appellate assignment from an appellate attorney.

**I. MINORS SEEKING JUDICIAL CONSENT FOR ABORTION**

Attorneys who wish to accept assignments to represent minors seeking judicial consent for abortion must apply for admission to the Minors Seeking Judicial Consent for Abortion panel and successfully complete all required trainings.

Attorneys seeking certification to accept these assignments must submit an application for the Minors Seeking Judicial Consent for Abortion certification training program, which is co-sponsored by CPCS, the National Lawyers Guild, and the Women's Bar Association of Massachusetts. Certification training programs take place periodically and are announced on CPCS's website at [www.publiccounsel.net/cafl/training](http://www.publiccounsel.net/cafl/training). Instructions on how to apply accompany each announcement.

The Committee has adopted [Performance Standards Governing Representation of Minors Seeking Abortion](#). Attorneys who wish to be eligible to accept assignments in these cases must agree to abide by these standards, complete a training session, and regularly accept assignments.

For additional information, please contact:

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Tel: (617) 492-5085; Fax: (617) 492-5098; Email: [klibaner@sprintmail.com](mailto:klibaner@sprintmail.com)

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Tel: (617) 482-8296; Fax: (617) 338-8299; Email: [Smccln@aol.com](mailto:Smccln@aol.com) or

Alice Turner, Interim Trial Panel Director, CPCS, 75 Federal Street,  
Boston, MA 02110; Tel: 617-910-5743; Email: [aturner@publiccounsel.net](mailto:aturner@publiccounsel.net)

## **1. ASSIGNMENT OF CASES**

CPCS provides a list of certified attorneys to clinics and some courts. The majority of the assignments are made by clinics.

## **2. PERFORMANCE REQUIREMENTS**

By accepting assignments on these cases attorneys agree to abide by the [CPCS Performance Standards for Attorneys Representing Minors Seeking Judicial Consent for an Abortion](#), which are found in this manual at [Chapter 4](#), and are available online at [www.publiccounsel.net](http://www.publiccounsel.net).

## **J. SEX OFFENDER REGISTRY BOARD**

### **1. REPRESENTATION AT SORB HEARINGS AND ADMINISTRATIVE REVIEW (G.L. C. 30A) IN SUPERIOR COURT**

Attorneys who wish to receive assignments from CPCS to represent clients before the Sex Offender Registry Board (SORB) and on review in the Superior Court pursuant to G.L. c. 30A must apply to the Alternative Commitment and Registration Support Unit (ACRSU) for certification. Requirements include: (1) current membership in good standing in a bar advocate program, or significant comparable trial experience in criminal and/or administrative law; (2) successful completion of all required trainings; (3) working with a mentor assigned by the ACRSU; and (4) attending two hours, or an

amount to be determined by the Director of the ACRSU in individual cases, of ACRSU-approved continuing legal education each fiscal year.

**a. Application Procedure**

Attorneys must submit an application for the SORB hearings panel. Attorneys who are not currently members of a bar advocate program must additionally submit a request for waiver of this requirement. Both the application and request for waiver forms are available on the CPCS website, <http://www.publiccounsel.net/pc/attorney-panel-certification-resources/>, or by contacting the Assignment Coordinator at [ac@publiccounsel.net](mailto:ac@publiccounsel.net) or 617-910-5827. Attorneys will be notified if they are accepted into the training program.

**b. Training Requirements**

**Initial Certification:** Attorneys accepted into the training program must successfully complete a two day seminar held at MCLE in Boston entitled, “Trying Sex Offender Registry Board Cases Certification Training.” Applicants will be informed of the date of the training.

**Annual Requirements:** Hearings panel attorneys must complete two hours, or an amount to be determined by the Director of the ACRSU in individual cases, of continuing legal education each fiscal year. Attorneys are required to attend seminars sponsored by the ACRSU for SORB panel attorneys to satisfy this requirement at least every other fiscal year. The fiscal year begins on July 1 and concludes on June 30. Hearings panel attorneys are required to satisfy the continuing education requirement beginning in the fiscal year after they successfully complete the SORB Hearings Panel Certification Training.

Attorneys should contact the Assignment Coordinator to report CLE hours or to request approval for a training that is not sponsored by the ACRSU ([ac@publiccounsel.net](mailto:ac@publiccounsel.net); 617-910-5827; 75 Federal Street, Boston, MA 02110).

**c. Assignment of Cases**

Assignments are made by the Assignment Coordinator of the ACRSU.

**d. Assignment Requirements**

To maintain certification, attorneys must regularly accept appointments. Attorneys who do not satisfy this requirement may be removed from the panel at the discretion of

the Director of the ACRSU.

**e. Provisional Certification**

The ACRSU assigns mentors to attorneys who satisfactorily complete the certification training. Attorneys are provisionally certified during the period of their mentorship. Provisionally-certified attorneys must work cooperatively with their assigned mentors for at least their first three cases. Mentors will update the Director or her designee about the work of each of their mentees throughout the mentoring period. Mentees are also asked to fill out a questionnaire about the effectiveness of their mentoring experience.

The ACRSU Director or his/her designee determines when the mentorship ends. If determined that the provisionally-certified attorney no longer requires a mentor, the attorney will be fully certified and permitted to take additional assignments without mentor supervision. At any time during the provisionally-certified attorney's mentorship, the Director or his/her designee may:

- i. graduate the attorney from the mentor program;
- ii. extend the period of mentorship;
- iii. remove the attorney's certification to take new assignments;
- iv. remove the attorney from the panel and have his/her cases reassigned;
- v. set caseload limits or other conditions.

**f. Performance Requirements**

By accepting assignments to represent clients before the Sex Offender Registry Board and on administrative review pursuant to G.L. c. 30A in Superior Court, attorneys agree to comply with all applicable CPCS Performance Standards. The Standards are contained in [Chapter 4](#) of this manual and are available online at [www.publiccounsel.net](http://www.publiccounsel.net). The ACRSU Director or his/her designee may, at his or her discretion and when in the interests of a client, require an attorney to file a Motion to Withdraw and request the appointment of successor counsel.

Trial counsel must notify CPCS of the need for appellate counsel to be assigned by sending an appellate referral form to the ACRSU Assignment Coordinator at [ac@publiccounsel.net](mailto:ac@publiccounsel.net); 75 Federal Street, Boston, MA 02110; or 617-988-8493 (FAX). Hearings counsel is responsible for appellate proceedings until appellate counsel enters an appearance.

## 2. SORB APPELLATE REPRESENTATION

Attorneys who wish to receive SORB appellate assignments from CPCS must apply to the Alternative Commitment and Registration Support Unit (ACRSU) for admission. Requirements include: (1) successful completion of all required trainings; (2) membership in good standing on the CPCS post-conviction panel or equivalent experience; (3) working with a mentor assigned by the ACRSU; and (4) attending two hours, or an amount to be determined by the Director of the ACRSU in individual cases, of ACRSU-approved continuing legal education each fiscal year.

### a. Application Procedure

Attorneys must submit an application for the SORB appellate panel. Applications are available on the CPCS website, <http://www.publiccounsel.net/pc/attorney-panel-certification-resources/>, or by contacting the Assignment Coordinator at [ac@publiccounsel.net](mailto:ac@publiccounsel.net) or 617-910-5827. Attorneys will be notified if they are accepted into the training program.

### b. Training Requirements

**Initial Certification:** Attorneys accepted into the training program must successfully complete a two day seminar held at MCLE in Boston entitled, “Trying Sex Offender Registry Board Cases Certification Training.” Applicants will be informed of the date of the training.

**Annual Requirements:** Panel attorneys must complete two hours, or an amount to be determined by the Director of the ACRSU in individual cases, of continuing legal education each fiscal year. Attorneys are encouraged to attend annual seminars sponsored by the ACRSU for SORB panel attorneys to satisfy this requirement. The fiscal year begins on July 1 and concludes on June 30. Panel attorneys are required to satisfy the annual continuing education requirement beginning in the fiscal year after completion of the SORB Certification Training.

Attorneys should contact the Assignment Coordinator to report CLE hours or to request approval for a training that is not sponsored by the ACRSU ([ac@publiccounsel.net](mailto:ac@publiccounsel.net); 617-910-5827; 75 Federal Street, Boston, MA 02110).

### c. Assignment of Cases

Assignments are made by the Assignment Coordinator of the ACRSU.

**d. Assignment Requirements**

To maintain certification, attorneys must regularly accept appointments. Attorneys who do not satisfy this requirement may be removed from the panel at the discretion of the Director of the ACRSU.

**e. Provisional Certification**

The ACRSU assigns mentors to attorneys who satisfactorily complete the certification training. Attorneys are provisionally certified during the period of their mentorship. Provisionally-certified attorneys must work cooperatively with their assigned mentors for at least their first three cases. For each appellate assignment, the attorney will send the mentor copies of the transcripts, exhibits and key pleadings. The mentor will review these materials to help counsel identify appellate issues and research strategy. The mentor will also edit drafts of briefs prior to submission, authorize the filing of the brief, help the attorney prepare for oral argument, and address with the attorney other issues related to the appeal.

Mentors will update the Director or his/her designee about the work of each mentee throughout the mentoring period. Mentees are also asked to fill out a questionnaire about the effectiveness of their mentoring experience.

The ACRSU Director or his/her designee determines when the mentorship ends. If determined that the provisionally-certified attorney no longer requires a mentor, the attorney will be fully certified and permitted to take additional assignments without mentor supervision. At any time during the provisionally-certified attorney's mentorship, the Director or his/her designee may:

- i. graduate the attorney from the mentor program;
- ii. extend the period of mentorship;
- iii. remove the attorney's certification to take new assignments;
- iv. remove the attorney from the panel and have his/her cases reassigned;
- v. set caseload limits or other conditions.

**f. Performance Requirements**

By accepting SORB assignments to represent clients in the Appeals Court, attorneys agree to comply with all applicable trial and appellate CPCS Performance Standards. The Standards are contained in [Chapter 4](#) of this manual and are

available online at [www.publiccounsel.net](http://www.publiccounsel.net). Attorneys must submit copies of all briefs filed to the ACRSU. If the case is closed before briefing, the attorney must notify the ACRSU of the reason the assignment is closed. The ACRSU Director or his/her designee may exercise discretion when it is in the interests of a client to require an attorney to file a Motion to Withdraw and request the appointment of successor counsel.

## **K. SEXUALLY DANGEROUS PERSON (SDP) PROCEEDINGS**

### **1. SDP SUPERIOR COURT TRIALS**

Attorneys who wish to receive assignments from CPCS to represent clients at Sexually Dangerous Person (SDP) trials in Superior Court (initial commitments pursuant to G.L. c. 123A, §§ 12 and 15 and petitions for release pursuant to G.L. c. 123A, § 3.19) must apply to the Alternative Commitment and Registration Support Unit (ACRSU) for admission.

#### **a. Application Procedure**

Attorneys who meet the following criteria are eligible to apply to the ACRSU for membership on the SDP Trial panel:

(1) membership in good standing of a bar advocate program; (2) current CPCS Murder and/or Superior Court certification; (3) completion of all required trainings; (4) ability to work with a mentor assigned by the ACRSU for at least the first three trials; and (5) participation in two hours, or an amount to be determined by the Director of the ACRSU in individual cases, of ACRSU-approved continuing legal education each fiscal year. Applicants who are not members of a bar advocate program or are not Superior Court certified but have other significant experience which demonstrates qualification to accept Superior Court assignments and demonstrates familiarity with jury trial practice and procedures in the Massachusetts courts may apply for a waiver.

Both the application and request for waiver forms are available on the CPCS website, <http://www.publiccounsel.net/pc/attorney-panel-certification-resources/>, or by contacting the Assignment Coordinator at [ac@publiccounsel.net](mailto:ac@publiccounsel.net) or 617-910-5827. Attorneys will be notified if they are accepted into the training program.

**b. Training Requirements**

**Initial Certification:** Attorneys accepted into the training program must successfully complete a two to three day certification program entitled, “Trying SDP Cases and Appeals.” Applicants will be informed of the date of the training.

**Annual Requirements:** Panel attorneys must complete two hours, or an amount to be determined by the Director of the ACRSU in individual cases, of continuing legal education each fiscal year. It is required that the legal education requirement be satisfied by attending a seminar sponsored by the ACRSU specifically for SDP panel attorneys at least every other fiscal year. The fiscal year begins on July 1 and concludes on June 30. Panel attorneys are required to satisfy the annual continuing education requirement beginning in the fiscal year after completion of the SDP Certification Training.

Attorneys should contact the Assignment Coordinator to report CLE hours or to request approval for a training that is not sponsored by the ACRSU ([ac@publiccounsel.net](mailto:ac@publiccounsel.net); 617-910-5827; 75 Federal Street, Boston, MA 02110).

**c. Assignment of Cases**

Assignments are made by the Assignment Coordinator of the ACRSU.

**d. Assignment Requirements**

To maintain certification, attorneys must regularly accept appointments. Attorneys who do not satisfy this requirement may be removed from the panel at the discretion of the Director of the ACRSU.

**e. Provisional Certification**

The ACRSU assigns mentors to attorneys who satisfactorily complete the certification training. Attorneys are provisionally certified during the period of their mentorship. Provisionally-certified attorneys must work cooperatively with their assigned mentors for at least their first three trials. Mentors update the Director or his/her designee about the work of each of their mentees throughout the mentoring period. Mentees are also asked to fill out a questionnaire about the effectiveness of their mentoring experience.

The ACRSU Director or his/her designee determines when the mentorship ends. If determined that the provisionally-certified attorney no longer requires a mentor, the attorney will be fully certified and permitted to take additional assignments without mentor supervision. At any time during the provisionally-certified attorney's mentorship, the Director or his/her designee may:

- i. graduate the attorney from the mentor program;
- ii. extend the period of mentorship;
- iii. remove the attorney's certification to take new assignments;
- iv. remove the attorney from the panel and have his/her cases reassigned;
- v. set caseload limits or other conditions.

#### **f. Performance Requirements**

By accepting assignments to represent clients in SDP trials attorneys agree to comply with all applicable CPCS Performance Standards. The Standards are contained in [Chapter 4](#) of this manual and are available online at [www.publiccounsel.net](http://www.publiccounsel.net). The ACRSU Director or his/her designee may, at his or her discretion and when in the interests of a client, require an attorney to file a Motion to Withdraw and request the appointment of successor counsel.

In the event a client is found SDP after trial, it remains the responsibility of the trial attorney to file a Notice of Appeal. In addition, trial counsel should file a Petition for Discharge pursuant to G.L. c. 123A, § 9 on behalf of the client in the court where the sex offense originated, along with a Motion for Appointment of Counsel and Affidavit of Indigency. Trial counsel must notify CPCS of the need for appellate counsel assignment by sending an appellate referral form to the ACRSU Assignment Coordinator at [ac@publiccounsel.net](mailto:ac@publiccounsel.net) or 75 Federal Street, Boston, MA 02110.

## **2. SDP APPELLATE REPRESENTATION**

Attorneys who wish to receive SDP appellate assignments from CPCS must apply to the Alternative Commitment and Registration Support Unit (ACRSU) for admission. Requirements include: (1) successful completion of all required trainings; (2) membership in good standing on the CPCS post-conviction panel, or equivalent experience; (3) working with a mentor assigned by the ACRSU; and (4) attending two hours, or an amount to be determined by the Director of the ACRSU in individual cases, of ACRSU-approved continuing legal education each fiscal year.

**a. Application Procedure**

Attorneys must submit an application for the SDP appellate panel. Applications are available on the CPCS website, <http://www.publiccounsel.net/pc/attorney-panel-certification-resources/>, or by contacting the Assignment Coordinator at [ac@publiccounsel.net](mailto:ac@publiccounsel.net) or 617-910-5827. Attorneys will be notified if they are accepted into the training program.

**b. Training Requirements**

**Initial Certification:** Attorneys accepted into the training program must successfully complete a two to three day seminar entitled, “Trying SDP Cases and Appeals.” Applicants will be informed of the date of the training.

**Annual Requirements:** Panel attorneys must complete two hours, or an amount to be determined by the Director of the ACRSU in individual cases, of continuing legal education each fiscal year. Attorneys are encouraged to attend annual seminars sponsored by the ACRSU for SDP panel attorneys to satisfy this requirement. The fiscal year begins on July 1 and concludes on June 30. Panel attorneys are required to satisfy the annual continuing education requirement beginning in the fiscal year after completion of the SDP Certification Training.

Attorneys should contact the Assignment Coordinator to report CLE hours or to request approval for a training that is not sponsored by the ACRSU ([ac@publiccounsel.net](mailto:ac@publiccounsel.net); 617-910-5827; 75 Federal Street, Boston MA 02110).

**c. Assignment of Cases**

Assignments are made by the Assignment Coordinator of the ACRSU.

**d. Assignment Requirements**

To maintain certification, attorneys must regularly accept appointments. Attorneys who do not satisfy this requirement may be removed from the panel at the discretion of the Director of the ACRSU.

**e. Provisional Certification**

The ACRSU assigns mentors to attorneys who satisfactorily complete the certification training. Attorneys are provisionally certified during the period of their mentorship. Provisionally-certified attorneys must work cooperatively with their assigned mentors for at least their first three cases. For each appellate assignment, the attorney will send the mentor copies of the transcripts, exhibits and key pleadings. The mentor will review these materials to help counsel identify appellate issues and research strategy. The mentor will also edit drafts of briefs prior to submission, authorize the filing of the brief, help the attorney prepare for oral argument, and address with the attorney other issues related to the appeal.

Mentors will update the Director or his/her designee about the work of each mentee throughout the mentoring period. Mentees are also asked to fill out a questionnaire about the effectiveness of their mentoring experience.

The ACRSU Director or his/her designee determines when the mentorship ends. If determined that the provisionally-certified attorney no longer requires a mentor, the attorney will be fully certified and permitted to take additional assignments without mentor supervision. At any time during the provisionally-certified attorney's mentorship, the Director or his/her designee may:

- i. graduate the attorney from the mentor program;
- ii. extend the period of mentorship;
- iii. remove the attorney's certification to take new assignments;
- iv. remove the attorney from the panel and have his/her cases reassigned;
- v. set caseload limits or other conditions.

**f. Performance Requirements**

By accepting SDP assignments to represent clients in the Appeals Court, attorneys agree to comply with all applicable trial and appellate CPCS Performance Standards. The Standards are contained in [Chapter 4](#) of this manual and are available online at [www.publiccounsel.net](http://www.publiccounsel.net). Attorneys must submit copies of all briefs filed to the ACRSU. If the case is closed before briefing, the attorney must notify the ACRSU of the reason the assignment is closed. The ACRSU Director or his/her designee may exercise discretion when it is in the interests of a client to require an attorney to file a Motion to Withdraw and request the appointment of successor counsel.

## **L. WAIVER OF TRAINING REQUIREMENTS**

CPCS has instituted training requirements for certification in most categories of cases in order to assure that each attorney accepting assignments has sufficient training to provide high quality representation. The training requirement is rarely waived.

A request for a waiver will be considered only if the applicant has exceptional experience in the field in which s/he seeks certification. The applicant requesting a waiver must submit a letter to the Director of the appropriate certification panel explaining in detail why the training requirement should be waived. The letter should describe the applicant's litigation experience, familiarity with practice and procedure of Massachusetts courts, and familiarity with the area of substantive law in which the waiver is sought. Specific information should be provided about cases in which the applicant has provided representation as lead counsel, including court, docket number, names of judges and opposing counsel, dates of court appearances, and a description of the issues in each case. Specific cases describing the applicant's utilization of expert witnesses should also be included. Information about specialized training courses the applicant has attended or taught should be provided, including the names, dates, and sponsors of the training programs.

Waiver of a training requirement is within the discretion of the Chief Counsel, who may consider any additional information s/he considers relevant.

# Performance Standards

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**A. PREAMBLE**

The Committee has adopted the following standards governing attorney performance in various types of cases. Attorneys accepting assignments must agree to handle their cases consistent with these standards.

**B. PERFORMANCE STANDARDS GOVERNING REPRESENTATION OF CLIENTS IN CRIMINAL TRIAL CASES**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D, including CPCS staff counsel. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

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## **GENERAL PRINCIPLES OF REPRESENTATION**

### **A. Role of Defense Counsel**

Counsel's role in the criminal justice system is to ensure that the interests and rights of the client are fully protected and advanced. Counsel's personal opinion of the client's guilt is totally irrelevant. The client's financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Counsel must know and adhere to all applicable ethical opinions and standards and comply with the rules of the court. Where appropriate, counsel may consider a legal challenge to inappropriate rules and/or opinions. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers. Public Defender Division staff counsel should seek guidance from their supervisor or Attorney-in-Charge. Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

Recognizing that we live in a society and work in a world with a legacy in which people are subjected to discrimination and oppression based on race, sex, religion/creed, national origin, ancestry, disability, age, sexual orientation, gender identity, immigration status, or socioeconomic status, counsel should be aware of the risk of bias our clients face in our efforts to represent them. The further obligation of counsel is to have an understanding and strive to combat the negative effects of such bias on counsel's relationship with the client and in the representation of the client. Also, counsel should be open, respectful, and understanding of a client's lived experiences.

### **B. General Duties of Defense Counsel**

Assigned Counsel shall, in a client-directed approach, oppose implicit (unconscious) or explicit (knowing) bias and/or discrimination on the basis of a person's race, sex, religion/creed, national origin, ancestry, disability, age, sexual orientation, gender identity, immigration status, or socioeconomic status, whether or not unlawful, at every stage of the representation of their clients. "Implicit bias" refers to attitudes, feelings, prejudices, stereotypes, and judgements that we unconsciously hold about people or groups. By definition, we are either unaware of these feelings or we are unable to pinpoint where they come from. While everyone has implicit biases, the nature of these prejudices isn't universal. They're ingrained in our subconscious through our individual experiences, upbringings, and backgrounds. By implication, without being aware of it we may engage in discriminatory behavior towards others. "Explicit bias" is the traditional conceptualization of bias. With explicit bias, individuals are aware of their prejudices, feelings, stereotypes, judgements, and attitudes toward certain groups. Positive or negative preferences for a group are conscious.

Implicit or explicit bias causes a slight to a person, reflects a lack of respect or hostility

toward a person in relation to their membership in a protected category. Bias can manifest in many ways, including harsh tones, shunning, derogatory comments or jokes, demeaning statements, misidentification, mispronunciation of names, and mistakes in identifying a person in relation to their actual identity.

Discrimination can be defined as different treatment that denies the same rights, benefits, or obligations to a person because of their protected category that is not denied to others in a different and often majoritarian group context. Discrimination can also be based on the inconsistent application of a policy or rule which is neutral on its face for bias but results in a statistically disparate impact on people because of their protected category membership. The difference between bias and discrimination can be slight and acts of bias can ultimately grow into actionable discrimination if it is not checked.

1. Assigned counsel should be able to:
  - a. Identify how implicit or explicit bias, discrimination, and structural racism may adversely affect their client's case and life circumstances.
  - b. Communicate effectively and appropriately with clients on issues related to implicit or explicit bias, structural racism, and all other forms of discrimination on the basis of a person's race, sex, religion/creed, national origin, ancestry, disability, age, sexual orientation, gender identity, immigration status, or socioeconomic status.
  - c. Address issues of structural racism, and all other forms of discrimination on the basis of a person's race, sex, religion/creed, national origin, ancestry, disability, age, sexual orientation, gender identity, immigration status, or socioeconomic status at any stage in the court proceedings, including in their motion practice, and where appropriate, by presenting data, scientific literature, and expert witnesses.
  - d. Addresses when discriminatory practices or statements are made in court.
2. Counsel's primary and most fundamental responsibility is to promote and protect the client's interest. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case. If personal reactions make it impossible for counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client.
3. In order to properly prepare the client's case and to apprise the client of

the progress of the case, counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. When counsel is assigned to represent a new client and the client is held in custody (e.g. in jail, house of correction, prison or other place of commitment for alcohol/drug or mental health evaluation), counsel should visit the client within three business days of receiving the assignment. Visiting the client means going to the client's place of confinement. Meeting with the client at the courthouse is not a substitute for a visit to the place of confinement, which is necessary to establish the attorney client relationship and to provide the same zealous representation as that provided to paying clients. A remote visit, via a videoconference feed, is not a substitute for an in-person visit to the place of confinement.

4. In those instances when it will not be possible for counsel to see a new in-custody client within three business days of assignment, the attorney must: (1) write to the client within three business days of receiving the assignment and advise the client that s/he has been assigned to the representation and also inform the client of the date upon which counsel will visit the client; and (2) if appropriate, provide the client with a copy of discovery received in the case. Under no circumstances should an initial visit to a new in-custody client be delayed more than one week from the date of assignment. Counsel should assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise counsel of the evidence and defenses in his/her case.
5. In order to advise the client about decisions to assert or waive rights to prepare the client to testify at any hearing, and to apprise the client of the progress of the case, counsel must meet with the client as needed and at reasonable intervals in private at counsel's office or at the client's place of confinement throughout the pendency of the case, and until the representation has concluded.
6. Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving regular collect telephone calls from incarcerated clients. Counsel must provide incarcerated clients with directions on how to contact the office via collect telephone calls (e.g. what days and/or hours calls will be accepted).
7. Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client. As part of this file, counsel should maintain a "running sheet" (Public Defender Division staff counsel should maintain

an electronic “running sheet”) or log which records the progress of the case and information such as information obtained during all interviews of the client; interviews of witnesses, interviews of family members, friends and employers; client’s background and history; court dates and court events; and what transpired in court during a motion hearing or trial; contact with investigators and results of investigations; conversations with the prosecutor regarding discovery, dispositional issues including plea offers, trial issues; conversations with the probation officer; lobby conferences or conversations with a judge; conversations with police officers or commonwealth investigators; telephone conversations regarding the case; consultations, consultation and evaluation by experts, filing and receipt of motions and memorandum and other court documents; court decisions and orders; etc.

8. Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner. Public Defender Division staff counsel must follow office and division-wide policies and procedures for the prompt identification and resolution of conflicts.
9. The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to proceed without counsel, whether to plead guilty or not guilty and to change such plea; whether to accept a plea agreement, whether to be tried by a jury or a court; whether to testify in his or her own behalf; whether to appeal, and whether to waive his/her right to a speedy trial.
10. The attorney should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney’s decision-making role in this regard is consideration of the client’s input and full disclosure by the attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney’s ethical obligation, informed by professional judgment, not to present frivolous matters or unfounded actions. If there is disagreement on significant matters of tactics or strategy between the client and defense counsel, counsel should discuss this fully with the client and consider making a written record of the circumstances, counsel’s advice and reasons, and the conclusions reached; showing the written record to the client and preserving it in the file.
11. Counsel’s obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should

- fully cooperate with successor counsel and must, upon request, promptly provide successor counsel with the client's entire case file, including work product.
12. Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.
  13. Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared. Counsel should follow appropriate court practices to minimize inconvenience to any individuals.
  14. Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g., motions to change venue, etc.
  15. Where counsel is unable to communicate with the client because of language differences, the attorney shall take whatever steps are necessary to fully explain the proceedings. Such steps would include obtaining funds for an interpreter to assist with pre-trial preparation, interviews, and investigation as well as in-court proceedings.
  16. Where counsel is unable to communicate with the client because of mental disability, the attorney shall obtain expert assistance for an evaluation of the client to determine what steps, if any, can be taken to improve communication and understanding to acceptable levels. If no steps can be taken, counsel should address the court on the issue of the client's competence.
  17. Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client and the court, and to minimize the inconvenience to others.

## **2. PRELIMINARY PROCEEDINGS & PREPARATION**

### **A. Arraignment**

- i. Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release (G.L. c.276, § 58) as well as the procedure for appeal of the court's decision. If the nature of the offense and/or the client's record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and

inform the client of the exact charges, should review the police report(s) and should review the client's probation record paying particular attention to any convictions, incarcerations, defaults, pending cases, open probation matters and open restraining orders.

- ii. Counsel should be familiar with the law regarding pre-trial detention on the grounds of "dangerousness" (G.L. c. 276, § 58A). If the Commonwealth moves for a hearing to determine whether or not the client should be detained, counsel should determine whether or not there is a legal basis for such a motion. Counsel should seek to minimize the amount of time the client is held prior to a detention hearing. In preparing for a detention hearing, counsel should consider the wisdom and consequences of summoning witnesses including the complainant.<sup>1</sup>
- iii. In addition, counsel should be familiar with the law regarding bail revocation, pursuant to G.L. c. 276, § 58 and be prepared to raise constitutional issues. If the Commonwealth moves to revoke the client's bail on another case due to the new offense, counsel should determine whether or not there is a legal basis for such a motion. Counsel should be prepared to argue that the client facing bail revocation is entitled to the same process and the Commonwealth has the same burden of proof by clear and convincing evidence as a client facing

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<sup>1</sup> If counsel is not eligible to handle the case-in-chief, s/he should seek assignment to eligible counsel prior to the detention hearing. §58A preventive detention. Counsel should insist upon a hearing, notice and time to prepare and subpoena witnesses.

- iv. Counsel should strongly advise the client not to waive any significant rights at this proceeding, including whether to proceed with a jury trial or to waive a jury trial.
- v. A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare circumstances, and if the attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later, especially one which does not involve a criminal record such as diversion, drug evaluation under G.L. c. III(e), mediation, or pre-trial probation. However, counsel should be aware of potential immigration consequences of a continuance without a finding, which will usually be considered a conviction for immigration purposes.

- vi. Where strategically appropriate and especially if the client may be held on bail, counsel should request a trial or probable cause hearing as soon as practicable within thirty days (G.L. c. 276, § 35).
- vii. Counsel should be thoroughly familiar with the law and court practices regarding competence to stand trial and criminal responsibility (G.L. c. 123, §§ 15a and 15b; Mass. R. Crim. P. 14). Counsel should also be aware of, and protect, the client's statutory and constitutional rights with respect to such competency examinations. Counsel, who is appointed to represent the client for bail only, should give special consideration to these issues and should rarely, if ever, agree to such a commitment at the time of the client's arraignment.
- viii. The assigned criminal defense trial counsel should represent the client at any competency hearing arising in the case.

#### **B. Initial Interview and Preparation for Bail Hearing**

- i. The scope and focus of the initial interview will vary according to the circumstances under which it occurs. A meeting or conversation conducted in a courthouse hallway or lockup is not a substitute for a thorough interview conducted in private.
- ii. Counsel should observe and document any marks or wounds pertinent to the case, and secure and document any transient physical evidence.
- iii. Counsel should prevent the destruction of exculpatory evidence by the prompt filing of a Motion to Preserve Evidence, including preparation for the Court of an order with instructions that the prosecutor or an identifiable third party custodian immediately inform its agents of the order.
- iv. If identification may be an issue, counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.
- v. If the client may be detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of bail and/or pretrial conditions of release. Such information should generally include:
  - (a) client's residence and length of time at that residence and in the

- community;
  - (b) family (names, addresses and phone numbers);
  - (c) client's health (mental and physical);
  - (d) educational and/or employment background;
  - (e) explanation of any court defaults and any other information on the record;
  - (f) probation/parole status;
  - (g) possible sources of bail money;
  - (h) the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred;
  - (i) client's reputation in the community;
  - (j) whether the client's family, friends, or employer are present in the courtroom.
- vi. Such information should be verified whenever possible.
- vii. Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege.

Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone, including co-defendants, witnesses, family members, friends, fellow prisoners and any governmental personnel, unless counsel advises otherwise. Counsel should inform the client of the right to request that his/her attorney be present at any interview or questioning. Counsel should also advise the client that, in general, all telephone conversations, from the place of detention, are recorded and may be shared with the prosecution. Counsel should advise the client not to discuss any aspect of the case with family or friends when using a telephone from the place of detention.

### **C. Bail or Detention Hearing**

- i. Counsel has an obligation to vigorously attempt to secure the pretrial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery.
- ii. Counsel's argument to the court should include the client's ties to the community and other factors that support a conclusion that the client, if

released, will return for future court appearances. The client should not, except in the judgment of very experienced counsel, under the most extraordinary circumstances, testify at a bail hearing. Although comments on the strength and quality of the Commonwealth's case are appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client's defense should not be revealed at the arraignment or bail hearing. Counsel should, where appropriate and helpful, identify people who are in the courtroom on behalf of the client. Counsel should, where appropriate and helpful, engage the services of a social service advocate to obtain an appropriate community placement for the client.

- iii. Counsel should be prepared to address the special issues of "dangerousness" that are the focus of hearings under G.L. c. 276, § 58A, and, where appropriate and possible, be ready to present proffers that address those issues. Counsel should be prepared to address the issue of bail revocation pursuant to G.L. c. 276, § 58. Counsel should also be prepared to address the issue of detention related to a preliminary probation violation hearing.
- iv. Counsel should consider advocating for reasonable conditions of release or recognizance pursuant to pre-trial probation G.L. c. 276, § 87, such as electronic monitoring, stay away orders, curfews, mental health treatment, substance abuse treatment, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties. Counsel must discuss these conditions of release with the client prior to suggesting them at the hearing.
- v. Where the client is not able to obtain release under the conditions set by the court, counsel should advise the client of his/her right to appeal under G.L. c. 276, §§ 58, 58A and the advantages and disadvantages of doing so. Counsel should facilitate the bail appeal procedure, including, where appropriate, pressing for the right to be heard on the same day. Counsel should, whenever possible, be prepared to represent the client at the hearing. If counsel cannot represent the client at the bail appeal, s/he should assure that the counsel who does has all information necessary before proceeding with the bail appeal.
- vi. Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court and the sheriff to any special needs of the client, e.g. medical problems, and request the court to order appropriate measures. Counsel should follow-up with the client and the facility to ensure that the client's needs are being addressed.

#### **D. Preliminary Discovery Issues/Prosecution Requests for Non-Testimonial Evidence**

- i. Counsel should carefully examine and seek copies of all pertinent and available court papers and police reports. If the police report is redacted, counsel should move for the names and addresses of all witnesses. Counsel should seek preservation and/or discovery of evidence (such as visible injuries) likely to become unavailable unless special measures are taken. Where appropriate, counsel should request court orders for preservation of evidence, e.g. “911” or turret tape recordings, notes of investigating officers, and biological/forensic evidence. Counsel should be aware of the potential for loss or destruction of evidence by forensic examination or testing and take appropriate steps to prevent or minimize it. Counsel should know and protect the client’s rights governing the prosecution’s efforts to require a defendant to submit to procedures for gathering non-testimonial evidence, such as lineups or other identification procedures, handwriting exemplars, physical specimens, etc.

#### **E. Special Concerns**

- i. Particularly if the client is detained, counsel should consider a prompt motion to dismiss any charge or aggravating element that is not supported by probable cause.
- ii. Where appropriate, counsel should consider advantages and disadvantages of seeking cross-complaints.
- iii. Counsel should consider obtaining funds at arraignment for an interpreter if the client does not speak English; an investigator, if immediate investigation of the allegations is necessary; and/or an expert (e.g. psychologist) if immediate psychological/psychiatric evaluation of the client is warranted. Otherwise, these motions may be filed at the pre-trial hearing date.
- iv. Counsel should take advantage, where appropriate, of opportunities to interview witnesses who may be present in court. Counsel must avoid becoming a witness in his/her own case. Therefore, interviews of prosecution witnesses should be “witnessed” by another person, preferably an investigator or another defense attorney to avoid later problems with proving an impeaching statement at trial.

### 3. PROBABLE CAUSE HEARING

#### a. Declination Hearing

Where, because of concurrent jurisdiction, a case may be heard in the District Court Department as either a trial or a probable cause hearing, counsel should consider which alternative is in the client's best interest and be prepared to argue that position persuasively to the court and prosecutor.

#### b. Probable Cause Hearing (Many of the standards in subsections 5 and 6 apply also to this subsection.)

- i. Counsel should always seek to obtain a probable cause hearing and avoid a direct indictment unless good reasons exist for a different strategy.
- ii. Where the client is entitled to a hearing, the attorney should insure that it is scheduled within thirty days, unless more time is needed to prepare, and delay will not increase the likelihood of direct indictment. Counsel should not waive this right without good reason.
- iii. In order to prepare for the hearing, counsel must know the elements of all charges against the client and must investigate as fully as possible the facts underlying the charges.
- iv. The probable cause hearing has a twofold purpose: to test the adequacy of the prosecution's case for binding over and to discover its strengths and weaknesses.
- v. Counsel should be certain that the proceedings are being adequately recorded. Counsel should be prepared to challenge the prosecution's showing of probable cause on each essential or aggravating element. Counsel should take advantage of the potential for discovery offered by a hearing by filing appropriate motions, using compulsory process, and sequestering witnesses. Counsel should not present evidence, especially the client's testimony, except in extraordinary circumstances where there is a sound tactical reason that overcomes the inadvisability of disclosing the defense case at this stage.
- vi. Where appropriate counsel should consider advocating that the court retain jurisdiction over a lesser-included offense.
- vii. As soon as practicable after the hearing, counsel should request a copy of the

tape recording of the proceedings for possible use as impeachment at the trial and for trial preparation. It is counsel's responsibility to arrange for transcription of the tape.

#### **4. PRETRIAL PREPARATION**

##### **A. Investigation**

Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for the criminal charges. The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others, or a client's expressed desire to plead guilty.

Defense counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities as well as from witnesses identified by the client or by others. Defense counsel should seek to interview all witnesses, including the alleged victim(s), and should not act to intimidate or unduly influence any witness.

Counsel should consider obtaining funds for an investigator to interview witness, while being aware of his/her reciprocal discovery obligations. Application to the court should be made *ex parte*, if appropriate, to protect the client's confidentiality.

Counsel's investigation should include evaluation of the prosecution's evidence, including possible re-testing or re-evaluation of physical, forensic and expert evidence. Counsel should go to the scene of the alleged crime in a timely manner - prior to the pre-trial hearing, when necessary - or prior to an evidentiary hearing or trial. Counsel should consider obtaining fair and accurate photographs, fair and accurate maps of the area and, where relevant, measurements.

##### **B. Probation Surrender Hearings**

Counsel appointed to represent a client charged with violation of his/her probation should prepare in the same way and with as much care as for a trial. Counsel must request time to: conduct an in-person interview with the probationer; discover and review the Probation Department file; discover and review records of the probationer's participation in mandated programs; obtain expert assistance to test the validity of scientific evidence underlying the surrender (e.g. urinalysis results); identify, locate, and interview exculpatory or mitigating witnesses, etc. Counsel

should consider selecting a date for the final hearing that allows the client sufficient time to work towards compliance with the conditions of probation.

Per District Court Rules for Probation Violation Proceedings, most judges will not allow the violation of probation hearing to track a new offense. Therefore, counsel must prepare for the final hearing based upon the facts of the new offense and familiarize him/herself with the case law regarding admissibility and sufficiency of hearsay in these proceedings. If counsel does not represent the client on the new offense, counsel should contact the attorney who does represent the client on the new offense to discuss the hearing, possible discovery issues, possible defenses and possible consequences of a finding of a violation of probation.

### **C. Pre-trial Motions and Affidavit**

Counsel should file any motions that are strategically and legally appropriate. The decision to file motions should be made only after appropriate investigation (including client interview, examination of court documents and other material obtainable through informal means and summons) and researching relevant law. Counsel must be familiar with the requirements of the Massachusetts Rules of Criminal Procedure, including time limits and affidavit requirements. If more time is needed, it should be requested. Before filing a pretrial motion and affidavit, counsel should be aware of any adverse potential effects, such as its impact on the defendant's speedy trial rights or the opportunity it provides the Commonwealth to preview and strengthen a weak case. Counsel should also be aware of the adverse consequences that may attend the failure to file motions, such as waiver of rights or defenses. Affidavits should be drafted with care to protect the client's Fifth Amendment rights and to avoid disclosing trial strategy.

### **D. Pre-trial Conference Reports**

If a pretrial conference is ordered, counsel should be cognizant of the requirements of Mass. R. Crim. P. 11. Counsel should carefully scrutinize and amend any pretrial conference forms to comport with fairness and case law and to protect the client's best interests. Counsel should amend pretrial conference report forms to accurately reflect counsel's reciprocal discovery obligations pursuant to Mass. R. Crim. P. 14 (a)(3) and relevant case law.

### **E. Discovery and Rule 17 Motions**

Counsel should be familiar with the provisions of Rule 14(a)(1)(A) of the Massachusetts Rules of Criminal Procedure, regarding automatic, mandatory discovery for the defendant. Counsel should also be familiar with Rule 17 of the

Massachusetts Rules of Criminal Procedure.

Among the discovery material counsel should consider seeking by motion are the following items that may be in the custody or under the control of law enforcement or other prosecution agents or agencies or may be obtainable through Rule 17:

- i. any item that would be helpful in preparing and trying the case (e.g., audio or videotapes of interviews, booking, scenes, etc.).
- ii. notice of prior or subsequent bad act evidence.
- iii. criminal history information of all witnesses.
- iv. notice of excited utterance evidence.
- v. information documenting different treatment or disparate impact within discretionary law enforcement decisions (i.e., traffic stops, pedestrian stops, or other police actions or discretionary prosecution decisions, i.e., charging decisions, detention requests, etc.) to litigate equal protection challenges.
- vi. information from third parties (obtained via Rule 17 motion) that will assist in the litigation of equal protection claims based on race or any other protected class.

#### **F. Reciprocal Discovery**

Counsel must be familiar with the rules and developing body of case law regarding reciprocal discovery. Counsel must be aware of, consider, and thoroughly research any potential obligations and time limits regarding reciprocal discovery (Mass. R. Crim. P. 14(a)(3)).

#### **G. Substantive Pretrial Motions**

Among the motions that counsel should consider filing are:

- i. equal protection claims based on race or another protected class; dismissal for unconstitutionality of the statute;
- ii. non-suggestive identification procedures (e.g., motion in opposition to a lineup or its equivalent, motion for testimony with client out of view, etc.);
- iii. dismissal for unconstitutionality of the statute;
- iv. dismissal for insufficiency of the complaint or indictment;
- v. dismissal for insufficiency of the evidence presented to the grand jury/magistrate resulting in indictment/complaint, or for impairment of the integrity of the grand jury; suppression of evidence obtained in violation of federal and Massachusetts law, i.e. (1) illegally seized evidence, (2) statements not preceded by Miranda warnings or otherwise involuntary statements, (3) unrecorded confessions, (4) identifications procured by impermissibly suggestive procedures;
- vi. request for speedy trial or dismissal for lack of speedy trial either for violation

- of Rule 36 or on constitutional grounds; any other issues that are appropriate.
- vii.** severance or joinder of defendants or charges;
- viii.** suppression of evidence obtained in violation of federal and Massachusetts law, i.e. (1) illegally seized evidence, (2) statements not preceded by Miranda warnings or otherwise involuntary statements, (3) unrecorded confessions, (4) identifications procured by impermissibly suggestive procedures (5) racially based stops, searches and seizures of clients, or other equal protection challenges to police investigative techniques or prosecutorial decisions based on the Fourth Amendment and/or the Equal Protection Clause of the U.S. Constitution and the Mass. Declaration of Rights arts. 1, 10, and 14.
- ix.** funds for experts, investigators, interpreters, etc., under G.L. c. 261, §§ 27A-D. Counsel should consider retaining experts as consultants to aid in trial preparation, not only as witnesses. Counsel should be familiar with and ready to use the special appellate remedies provided for in these statutes.
- x.** any other issues that are appropriate.

## **H. Trial Motions**

Counsel must address at trial any discriminatory practices, statements, or evidence involving a member of the court personnel, juror, co-counsel, prosecutor, or witness that might contribute to an unfair or biased outcome by filing the necessary trial motions and by ensuring that the matter is documented “on the record,” e.g., making the necessary objections, asking to strike a remark or argument that display prejudice or bias or rely upon an misleading stereotype. Trial matters to consider: (1) jury selection and voir dire; (2) motions in limine or other trial motion; (3) opening and closing statements; (4) jury instructions; and (4) sentencing.

Counsel should be aware that certain motions are generally reserved for the trial judge, e.g., motions in limine and motions to sequester. Counsel should be aware of any time limitations placed on the filing of trial motions by standing order and should file all trial motions timely.

### **I. Motion Hearings**

When a dispute on a motion requires a hearing, counsel’s preparation should include:

- i.** investigation and discovery necessary to advance the claim, including reviewing all available documents, interviewing witnesses, visiting any scenes relevant to the subject matter of the motion;
- ii.** careful research of appropriate case law which supports or expands rights guaranteed by the federal and state constitutions and/or the Massachusetts Rules of Criminal Procedure;
- iii.** subpoenas for pertinent evidence and witnesses;

- iv. full understanding of the burdens of proof and evidentiary rules;
- v. careful consideration of the benefits/costs of having the client testify;
- vi. careful preparation of any witnesses who are called, especially the defendant; witnesses should be interviewed, prior to the hearing date, at the office of defense counsel or at a private location that is convenient for the witness;
- vii. submission of a memorandum of law may be required, and in most cases is advisable;
- viii. if defense counsel has not had adequate time to prepare and is unsure of the relevant facts or law, counsel should communicate to the court the limits of defense counsel's knowledge or preparation.

#### **J. Discovery Compliance**

Once counsel's discovery motions are allowed, if appropriate, counsel should seek prompt compliance and/or sanctions for failure to comply.

#### **K. Interlocutory Relief**

Where appropriate, counsel should consider seeking interlocutory relief, under the applicable Rule or statute, after an adverse pretrial ruling. The conduct of interlocutory hearings, including the submission of briefs and oral argument, are ordinarily the responsibility of trial counsel, whether the hearing was initiated by counsel or by the prosecution. Private court-appointed trial counsel handling an interlocutory appeal should contact the CPCS Director of Criminal Appeals-Private Counsel Division to determine whether assistance by appellate counsel is warranted. Public defender staff counsel must contact the chief appellate attorney of the Public Defender Division.

#### **L. Sentencing**

Counsel should begin gathering information relative to possible sentencing.

### **5. DISPOSITIONS BY PLEA OR ADMISSION**

#### **A. Plea Negotiations**

- i. After interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.
- ii. Counsel should inform the client of any plea negotiations before they occur

unless it is impractical to do so, in which case counsel should inform the client of the negotiations as soon after they occur as is possible.

- iii. The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based solely on the client's acknowledgement of guilt or solely on a favorable disposition offer.
- iv. Where negotiations are begun, counsel should attempt to obtain the most favorable disposition possible for the client. Defense counsel should promptly communicate and explain to the client any disposition proposals made by the prosecutor, while explaining that presenting the prosecution's offer does not indicate counsel's unwillingness to go to trial.
- v. Defense counsel should consider requesting the judge to participate in plea discussions, if appropriate. Rule 12(b)(2).

## **B. Client Decisions**

- i. Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change his/her position. If the client remains unpersuaded, however, the attorney should not unduly pressure the client to make any particular decision and should assure the client that he/she will defend the client vigorously.
- ii. Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or to admitting to sufficient facts by any means, including, but not limited to, overstating the likelihood of conviction or potential consequences, or by threatening to withdraw from representing the accused if he/she decides not to accept the proposed agreement and to proceed to trial.
- iii. Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were to proceed to trial on the merits.

### **C. Preparation**

- i. When a client decides to offer a change of plea, or admit to sufficient facts, counsel must be certain that the client understands all aspects of the plea agreement, if any, including sentencing recommendations, and is carefully prepared to participate in the procedures required under Mass. R. Crim. P. 12 and used in the particular court. Counsel shall also ascertain and advise the client of the court's practices concerning sentence recommendations and withdrawing pleas or admissions.
- ii. Before advising the prosecution and court that the client is willing to offer a change of plea or an admission to sufficient facts, counsel must also be satisfied that the plea is voluntary, that the client understands the nature of the charges, that there is a factual basis for the plea or the admission, that the witnesses are or will be available, and that the client understands the rights being waived including: a trial with or without a jury where the Commonwealth has the burden of proving guilt beyond a reasonable doubt, the right to confront witnesses, and the privilege against self-incrimination.
- iii. Counsel should negotiate the statement of facts with the prosecutor, advocating for language most favorable to the client. Counsel must also fully review the statement of facts with the client, and prepare him/her for the specific language to be used in court.

### **D. Consequences of Conviction**

Counsel must also advise the client, prior to any change of plea, of the consequences of a conviction, including:

- i. the maximum possible sentence of all offenses;
- ii. mandatory minimum sentences where applicable;
- iii. different or additional punishments where applicable, such as for second offenses, probation violation or parole revocation consequences;
- iv. potential liability for enhanced punishment after subsequent arrest (Counsel should be familiar with potentially applicable enhanced punishment statutes e.g. habitual offender, armed career criminal, second and subsequent offenses);
- v. possible Federal charges or penalty enhancements;
- vi. conviction consequences for non-citizens (G.L. c. 278, § 29D);
- vii. Sex Offender Registration Act (G.L. c. 6, §§ 178C et seq.) and DNA

- Seizure and Dissemination Act (G.L. c. 22E) requirements;
- viii. parole eligibility (including the discretionary nature of parole decisions and that being eligible for parole does not confer a right to parole);
  - ix. potential civil liabilities; including loss of housing and federal benefits;
  - x. possible loss or suspension of driver's license;
  - xi. potential risk of the Commonwealth seeking civil detention pursuant to the SDP (sexually dangerous persons) law;
  - xii. potential adverse consequences on the client's employment or education;
  - xiii. possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States;
  - xiv. potential loss of civil rights, including right to vote, sit on a jury, hold elective office, possess a firearm license;
  - xv. possible loss of eligibility to visit correctional institutions, jails or houses of correction.

#### **E. Necessity of Admission of Guilt**

Where the proceeding is a final adjudication, counsel should not advise the client to plead guilty or admit to sufficient facts unless the client either admits guilt to counsel, or admits guilt to the court in a colloquy or tenders an Alford plea. During

and after the change of plea colloquy, counsel must vigorously enforce all aspects of a plea agreement. Where a change of plea is contingent upon a specific agreement, counsel must be sure that the court is so informed before the tender of the plea, and that the agreement is duly recorded.

#### **F. Disposition Argument**

Notwithstanding a disposition by plea or an admission to sufficient facts, counsel must be prepared for sentencing arguments, including, where appropriate, release pending sentencing or appeal.

### **6. TRIAL PROCEEDINGS**

#### **A. General Trial Preparation**

- i. Counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:

- (a) summoning all potentially helpful witnesses, utilizing ex parte procedures if advisable (Mass. R. Crim. P. 17);
  - (b) summoning all potentially helpful physical or documentary evidence;
  - (c) arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful; e.g., testing of physical evidence, opinion testimony, etc.;
  - (d) obtaining and reading transcripts and/or prior proceedings in the case or related proceedings;
  - (e) obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects, or information which may aid the fact finder in understanding the defense case, and preparing to secure the admission of such evidence through witnesses who will testify at trial.
- ii. Where appropriate, counsel should have the following materials organized and accessible at the time of trial:
- (a) copies of all relevant documents in the case;
  - (b) relevant documents prepared by investigators;
  - (c) proposed voir dire questions;
  - (d) motions in limine;
  - (e) outline of opening statement;
  - (f) cross-examination plans for all possible prosecution witnesses;
  - (g) motion for required finding of not guilty, renewed motion for required finding of not guilty, and outline of argument for required findings of not guilty and authorities supporting it;
  - (h) direct examination plans for all prospective defense witnesses;
  - (i) copies of defense subpoenas;
  - (j) prior statements of all prosecution witnesses (e.g., Grand Jury minutes transcripts, police reports)
  - (k) prior statements of all defense witnesses;
  - (l) reports from defense experts, and an outline of the direct examination of the expert;
  - (m) a list of all defense exhibits, and the witnesses through whom each will be introduced;
  - (n) proposed jury instructions with supporting case citations;
  - (o) copies of all relevant statutes and cases, including any potential lesser-included offenses;
  - (p) outline or draft of closing argument.
- iii. Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and

evidentiary issues that can be anticipated in the trial.

- iv. If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant, prior or subsequent bad acts, reputation testimony, excited utterances, prejudicial evidence) and, where appropriate, counsel should prepare motions in limine and memoranda for such advance rulings.
- v. Counsel should be alert to and understand the importance of establishing, for appellate purposes, a complete record of the trial proceedings, and to be fully informed of the applicable law and practices regarding:
  - (a) preservation of each type of objection at every stage of the proceedings;
  - (b) offers of proof regarding evidence ruled inadmissible;
  - (c) recording of trial proceedings. Counsel should be aware that tape recordings of district court proceedings often prove to be inaudible or unreliable. Accordingly, counsel should make every attempt to obtain a stenographer, rather than rely only on a tape recording. G.L. c. 261, § 27(c); c. 218, § 27A.

## **B. Sequestration**

Unless tactically inadvisable, counsel shall seek sequestration of all witnesses (including police) for trial (Mass. R. Crim. P. 21).

## **C. Bench Trial or Jury Trial**

- i. The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel. See Section 5, Dispositions by Plea or Admission.
- ii. Counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Counsel should be knowledgeable about and advise the client of the practices of the judge before whom the case may be tried. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.
- iii. Counsel should be aware of and comply with the rules and orders regarding the timing of filing a notice of waiver of a jury.

## **D. Voir Dire and Jury Selection**

### **i. Preparation**

- (a) Counsel should be familiar with the law governing the selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire.
- (b) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, including Superior Court Rule 6, and should be alert to any potential legal challenges to these procedures.
- (c) Prior to jury selection, counsel should seek access to the juror questionnaires that have been completed by potential jurors.
- (d) Counsel should develop and file written voir dire questions tailored to the particular case in advance of trial.
- (e) Counsel should be familiar with the law concerning voir dire especially the statutes, rules, standing orders and protocols regarding attorney conducted voir dire.
- (f) Counsel should consider asking for extra peremptory challenges.
- (g) Counsel should be familiar with varied practices in this area and should attempt to employ these where appropriate.

### **ii. Examining Prospective Jurors**

- (a) Counsel should be familiar with case law that requires individual voir dire in certain cases, e.g. inter-racial murder or sexual assault cases, sexual assault on children, insanity defenses.
- (b) Where appropriate, by statute, court rule, standing order or protocol, counsel should consider seeking permission to personally voir dire the jurors, or at the very minimum, if the court poses questions, to ask follow-up questions.
- (c) Counsel should consider the option of asking that attorney conducted voir dire be individual voir dire or panel voir dire, depending on the particular case. When appropriate, counsel should request individual juror voir dire if the proposed voir dire questions may elicit highly sensitive information. Counsel should be familiar with case law supporting such requests.
- (d) Counsel should be familiar with case law regarding the client's right to be present during individual voir dire. Counsel should fully discuss the risks and benefits of asserting this right with the client.

iii. Challenges

- (a) Counsel should challenge for cause all persons about whom a legitimate argument can be made for prejudice or bias.
- (b) When challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors.
- (c) In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
- (d) Counsel should make every effort to consult with the client in exercising challenges.
- (e) Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures if the prosecutor strikes a juror based on any criteria rendered impermissible by the constitution, statutes, or applicable rules, including race, sex, religion, national origin, disability, sexual orientation or gender identity.

**E. Opening Statement**

- i. Counsel should consider the strategic advantages and disadvantages of making an opening statement, of disclosing particular information during the opening, and of deferring the opening statement until the beginning of the defense case. Except in extraordinary circumstances, counsel should make an opening statement immediately after the prosecution's, before the presentation of the evidence.
- ii. Counsel should be familiar with the law governing opening statements, particularly in a case where counsel does not plan to present any affirmative evidence. In addition, counsel should attempt to be familiar with individual trial judges' practices regarding the permissible content of opening statements.
- iii. Counsel's objectives in making an opening statement may include the following:
  - (a) to provide an overview of the theory of the defense case;
  - (b) to summarize the testimony of witnesses and the role of each in relationship to the entire case;
  - (c) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
  - (d) to identify the weaknesses of the prosecution's case;

- (e) to remind the jury of the prosecution's burden of proof;
- (f) to clarify the jurors' responsibilities;
- (g) to personalize the client and counsel to the jury.
- (h) Counsel should record, and consider incorporating in the defense summation, promises of proof the prosecutor makes to the jury during his/her opening statement.
- (i) Counsel should be prepared to object to the prosecutor's opening statement if it is improper and to seek curative instructions or a mistrial.

#### **F. Confronting the Prosecution's Case**

- i. Counsel should research and be fully familiar with all of the elements of each charged offense and should anticipate weaknesses in the prosecution's case.
- ii. Defense counsel should exercise strategic judgment regarding whether to object to prosecutions questions, and not necessarily make every possible objection. Defense counsel should not make objections without a reasonable basis, or for improper reasons, such as to harass the witness.
- iii. Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems.
- iv. In preparing for cross-examination, counsel should make an effort to be familiar with the applicable law, procedures and techniques concerning cross-examination and impeachment of witnesses.
- v. In preparing for and carrying out cross-examination, counsel should also:
  - (a) develop a coherent and sensible theory of the case, along with the framework of the closing argument;
  - (b) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;
  - (c) integrate into cross-examination the theory of the defense and closing argument;
  - (d) consider whether cross-examination of each witness is necessary or likely to generate helpful information;
  - (e) review and organize all prior statements and testimony of each witness;
  - (f) elicit inconsistencies and variations within each witness's testimony or contradictions (including material omissions) in prior statements by the witness;

- (g) elicit significant omissions or deficiencies in the testimony of any witness;
  - (h) consider using certified copies of prior convictions or pending cases of witnesses;
  - (i) elicit testimony on cross-examination, relating to witness competency or credibility, especially bias or motive for testifying falsely;
  - (j) be alert to potential 5th Amendment issues that apply to any witness;
  - (k) elicit all facts to build and support the theory of defense.
- vi. If counsel is surprised by any statements or items which should have been provided in discovery, but were not, counsel should request adequate time to review these before commencing cross-examination and should consider seeking any possible sanctions.
  - vii. Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.
  - viii. Unless it is clearly frivolous, counsel should move at the close of the prosecution's case and out of the presence of any jury for a required finding of not guilty on all charges and/or any aggravating element, where appropriate. For cases that have strong legal issues to support counsel's argument, counsel should research the applicable case law and prepare, in advance, a memorandum in support of his/her motion. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

#### **G. Presenting the Defense Case**

- i. Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel should consider and advise the client whether the client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof instead.
- ii. Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify (including the likely areas of cross-examination and impeachment).
- iii. Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of production.

- iv. In preparing for presentation of a defense case, counsel should, where appropriate:
  - (a) consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;
  - (b) after discussion with the client, make the decision whether to call any witnesses;
  - (c) develop a plan and an outline for direct examination of each potential defense witness;
  - (d) determine the implications that the order of witnesses may have on the defense case;
  - (e) consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
  - (f) consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;
  - (g) consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;
  - (h) attempt to obtain the prior criminal history records of all defense witnesses, including out-of-state and juvenile criminal histories, if applicable.
- v. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- vi. Counsel should prepare all witnesses for foreseeable cross-examination. Counsel should also advise witnesses of suitable courtroom dress, demeanor and procedures, including sequestration.
- vii. Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.
- viii. Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.
- ix. If an objection is sustained, counsel should make appropriate efforts to rephrase the question(s) and/or make an offer of proof.
- x. Counsel should guard against improper cross-examination by the prosecutor.

- xi. Counsel should conduct re-direct examination as appropriate.
- xii. At the close of the defense case, counsel should renew any previously filed motions for a required finding of not guilty on each count charged and/or aggravating element.
- xiii. Counsel should keep a record of all exhibits identified or admitted.

## **H. Closing Argument**

- i. Before argument, counsel must file and should seek to obtain rulings on all requests for instructions (see Mass. R. Crim. P. 24(b) and 26) in order to tailor or restrict the argument properly in compliance with the Court's rulings.
- ii. Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections and substance of closing arguments.
- iii. In developing closing argument, counsel should review the proceedings to determine what aspects can be used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:
  - (a) highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;
  - (b) favorable inferences to be drawn from the evidence;
  - (c) incorporating into the argument:
    - (1) a clear and concise theory of defense;
    - (2) helpful testimony from direct and cross-examinations;
    - (3) verbatim instructions drawn from the expected jury charge;
    - (4) responses to anticipated prosecution arguments;
    - (5) the effects of the defense argument on the prosecutor's possible rebuttal argument.
- iv. counsel should consider incorporating in his/her summation the promises of proof the prosecutor made to the jury during his/her opening.
- v. Whenever the prosecutor exceeds the scope of permissible argument, counsel must object (either immediately or at the conclusion of the argument), consider requesting a mistrial, or consider seeking cautionary instructions. Counsel should weigh strategic considerations in deciding whether to object

during or after the prosecutor's closing argument.

## **I. Jury Instructions**

- i. Counsel must file proposed or requested jury instructions before closing argument.
- ii. Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges, and preserving objections to the instructions.
- iii. Counsel should submit both standard and modified jury instructions tailored to the particular circumstances of the case and should provide case law in support of the proposed instructions.
- iv. Where appropriate, counsel should object and argue against instructions proposed by the prosecution.
- v. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading the proposed instructions into the record.
- vi. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions. After the charge, counsel should object on a timely basis to deviations and any other instructions unfavorable to the client, and, if necessary, request additional or curative instructions.
- vii. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard (outside the jury's presence) on the supplemental instruction before it is delivered.

## **J. Taking Verdicts**

Counsel should be alert to any improprieties in the verdict and consider requesting that the jury be polled before the verdict is affirmed.

## **7. SENTENCING**

### **A. Preparation**

Defense counsel should be familiar with and consider:

- i. the statutory penalties for each possible conviction, including each lesser-included offense and any repeat offender penalties;
- ii. the official version of the client's prior record, if any;
- iii. the client's background and as much mitigating information relevant to sentencing as possible;
- iv. the position of the probation department with respect to the client;
- v. the sentencing recommendation and memorandum, if any, of the prosecutor;
- vi. seeking the assistance of an expert – e.g. a social worker to draft a mitigation report or to find community or treatment based alternatives to incarceration;
- vii. the collateral consequences attaching to any possible sentence, e.g., parole or probation revocation, immigration consequences, later exposure as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender Registration, DNA Seizure, or civil forfeiture of property;
- viii. the sentencing practices of the judge, to the extent they may be determined;
- ix. the sentencing guidelines, as they would apply to the case;
- x. referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital as an aid to sentencing under c. 123, § 15(e);
- xi. any victim impact statement to be presented to the court;
- xii. any other report to be presented to the court in aid of sentencing;
- xiii. seeking an evidentiary hearing, e.g., restitution amount;
- xiv. requesting a continuance for sentencing at a later date;
- xv. any other information or proposals that may be helpful to the client.

## **B. Prosecution and Probation Recommendations**

Counsel should advocate in advance of trial or sentencing for a favorable recommendation from both the prosecutor and the representative of the probation department.

## **C. Pre-sentence Reports**

- i. Counsel should be familiar with the practices of the court and its probation department relative to pre-sentencing reports. Counsel should consider requesting one where, after consultation with the client, s/he has good reason to believe that it would be helpful.
- ii. Counsel shall determine the accuracy and completeness of all sentencing reports and statements and should be prepared to challenge any incorrect

information or omissions and take steps to correct these before prejudice occurs.

- iii. Counsel should carefully prepare the client for, and attempt to attend, any pre-sentence interview to be conducted in aid of sentencing. Counsel should advise about the client's Fifth Amendment rights, if appropriate.

#### **D. Defense Recommendations**

- i. Counsel should carefully consider and discuss with the client any sentencing recommendation to be made by the defense and the reasons for them. If appropriate, counsel should discuss any recommendations with other experienced defense counsel. Counsel should explore all reasonable alternatives to incarceration, e.g., community services, substance-abuse treatment programs, restitution.
- ii. Where tactically advisable or requested by the court, counsel should prepare a sentencing memorandum, presenting every factual and legal ground that will assist in reaching the most favorable disposition obtainable.
- iii. At sentencing, counsel should zealously advocate the best possible disposition, including a request for continuance without a finding, especially in an admission to sufficient facts if the client has no record. Counsel should take whatever steps are necessary, including, where appropriate, the presentation of documentary evidence and witnesses; e.g., reports or testimony from employers, community representatives, therapists/counselors, and family.
- iv. Where appropriate, counsel should carefully prepare the client or a close relative to address the court.

#### **E. Dispositions**

- i. Counsel should be alert to, and challenge by hearing if necessary, any inappropriate conditions of probation, including the amount of restitution.
- ii. Counsel should request a reasonable time period for the payment of any fines or restitution. If appropriate, counsel should request that a hearing be held to determine the amount of restitution and should represent the client at that hearing.
- iii. Counsel should fully explain the foreseeable consequences of the sentence,

including any conditions of probation and the consequences of violating probation.

- iv. Counsel should insure that the sentence accurately reflects the rights of the client for parole eligibility and jail credit.
- v. Counsel should consider requesting specific orders or recommendations from the court, including, but not limited to, the place or conditions of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, and recommendations against deportation.
- vi. Counsel should be familiar with the statutes and case law concerning jail credit. Counsel should ensure that the mittimus accurately reflects any jail credit to which the client is legally entitled. Trial counsel should be available to correct an error in the mittimus discovered at a later date.

#### **F. Sentence Appeals**

- i. In Superior Court cases, trial counsel should advise the client of any right to appeal his/her state prison sentence to the Appellate Division of the Superior Court and should implement the client's decision. Trial counsel should represent the client at the hearing.

### **8. POST-TRIAL PROCEEDINGS**

(See CPCS [Standards for Appellate Representation](#))

#### **A. Appellate Rights**

- i. Counsel should advise the client, after sentencing, about the right to file a motion to revoke and revise the sentence. Counsel should explain the value of filing the motion to enable the court to fashion an equitable disposition in future proceedings. Counsel should file such motion in a timely fashion, pursuant to Mass. R. Crim. P. 29, if requested to do so by the client or, if appropriate to protect the client's interests.
- ii. After advising the client of the right to appeal, trial counsel should implement the client's decision in that regard. If an appeal is taken, trial counsel should file in a timely fashion the appropriate notice and request either a tape or transcript of all prior court proceedings.
- iii. Immediately upon filing the notice to appeal, counsel shall notify CPCS of the appeal by completing the [Appeal Referral Form](#) and emailing it to

[appealform@publiccounsel.net](mailto:appealform@publiccounsel.net).

- iv. Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration.

## **B. Continuing Duty to Represent**

- i. Trial counsel should file a Notice of Appeal within 30 days after sentencing, order the transcript of the trial and sentencing hearings and other significant pre- or post-trial hearings and alert CPCS to the need to assign appellate counsel by completing and submitting the [Appeal Referral Form](#).
- ii. Counsel retains responsibility for the case until and unless another attorney assumes that responsibility. Trial counsel should fully cooperate with successor counsel including prompt provision of the trial file that includes all work product. Upon request of the client, trial counsel will provide a copy of said trial file.

## **9. ADDENDUM TO CPCS PERFORMANCE GUIDELINES GOVERNING CRIMINAL CASES**

### **A. Appellate Rights**

- i. Counsel should advise the client, after sentencing, about the right to file a motion to revoke and revise the sentence. Counsel should explain the value of filing the motion to enable the court to fashion an equitable disposition in future proceedings. Counsel should file such motion in a timely fashion, pursuant to Mass. R. Crim. P. 29, if requested to do so by the client or, if appropriate to protect the client's interests.
- ii. After advising the client of the right to appeal, trial counsel should implement the client's decision in that regard. If an appeal is taken, trial counsel should file a notice of appeal within 30 days after sentencing, order the transcript of the trial and sentencing hearings and other significant pre- or post-trial hearings and alert CPCS to the need to assign appellate counsel by completing and submitting the Appeal Referral Form.
- iii. Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration.

### **B. Continuing Duty to Represent**

- i. Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration.
- ii. Counsel retains responsibility for the case until and unless another attorney assumes that responsibility. Trial counsel should fully cooperate with successor counsel including prompt provision of the trial file that includes all work product.

Upon request of the client, trial counsel will provide a copy of said trial file.

## **10. PERFORMANCE STANDARDS GOVERNING CRIMINAL CASES IN DRUG COURTS**

- A. Prior to appearing in a drug court session for the first time or to advising a client of the advantages and disadvantages of entering a drug court program, counsel should thoroughly investigate the policies and practices of the session, including the following:
- i. Conformity of the program with the basic principle that no defendant should be required to surrender any of his or her due process rights as a condition of assignment to or participation in any drug court session;
  - ii. Eligibility requirements and restrictions;
  - iii. The role and responsibilities of each party within the session, including the judge, prosecutor, probation officer, treatment provider and defense attorney;
  - iv. The procedures for addressing violations of program requirements, imposition of graduated sanctions, and modifications which may result in confinement;
  - v. The procedures for addressing violations of probation which may result in termination of the client from the program;
  - vi. The ability of a client to voluntarily withdraw from the program.
- B. Drug courts operate within a framework that encourages a non-adversarial, “team” approach by all parties. The sole responsibility of counsel, however, is to advocate for and protect the interests of a client; it is not to be part of a team. Counsel should always advocate zealously for a client consistent with the role of defense counsel as described in the [CPCS Performance Standards Governing Criminal Cases](#).
- C. Discussions of a client’s participation in a drug court session which include the judge, probation officers, treatment providers and prosecutors, sometimes referred to as “team meetings,” must comport with due process rights of the client. If a judge is present, due process requires that such discussions occur on the record and in the client’s presence. Upon a client’s first appearance in a drug court session, counsel should file a written motion requesting that any discussion with a judge concerning the client occur on the record and in the client’s presence. If the motion is denied, counsel should object on the record.
- D. Counsel should only participate in a “team meeting” or discussion involving a client whom counsel represents, after counsel has sufficient opportunity to meet with the client, investigate the case, and prepare to represent the interests of the client. Counsel should not participate in a “team meeting” or other discussions concerning drug court

participants who are not clients.

- E. Whenever a probation officer, treatment provider or prosecutor advocates to a judge that a client at liberty should be subjected to any form of confinement (including inpatient substance abuse treatment), the client is entitled to be represented by counsel. ABA Standards Relating to Probation §3.3 (Approved Draft, 1970); *Commonwealth v. Faulkner*, 418 Mass. 352 (1994). In addition to the right to counsel, a request for modification of conditions of probation that results in confinement (as distinct from a request for probation detention pursuant to a notice of surrender) triggers other due process rights, including the right of the client to notice of the reasons confinement is being requested, the right of the client to be present, and the opportunity to be heard and to challenge the requested modification.
  
- F. When representing a client in a drug court session, counsel should have a thorough understanding of the law governing probation detention and probation surrenders and of its applicability to drug court sessions. Counsel should ensure that the court provides the client “the same due process rights as other persons placed upon probation supervision.”
  
- G. When discussing with a client the advisability of entering a drug court program, counsel should fully explain to the client the policies and practices of the program. Prior to providing such advice, counsel should interview the client, fully investigate the case, research the viability of any motions to dismiss and/or motion to suppress, and prepare a defense in the event the case proceeds to trial. Counsel should not advise a client at arraignment about whether to enter a drug court program. The decision whether to enter a drug court program belongs to the client after full consultation with counsel. See CPCS Performance Standards Governing Criminal Cases, section A subsections [5.a](#) through [5.b](#).
  
- H. After adequate consultation with counsel, if a client wishes to enter a drug court program, counsel should vigorously advocate for acceptance of the client into the program despite policies which may make the client ineligible (e.g., if the client is charged with a sex offense and the policy of the program excludes individuals charge with such offenses).
  
- I. Counsel should vigorously advocate for the admission of a client who wishes to enter a drug court program after arguing a motion to suppress, a motion to dismiss, or after a jury trial, despite the policy of the program that requires the waiver of due

process rights prior to admission. Counsel should be familiar with federal and state law governing confidentiality of substance abuse treatment records and its

applicability to treatment received by clients participating in drug court sessions. M.G.L. ch. 111E, § 18.

- J. Counsel should fully explain to a client the laws governing confidentiality of substance abuse treatment records and of statements of the client made in the course of such treatment. Counsel should further advise a client that, despite laws restricting the use of treatment records to prosecute or criminally investigate a client, especially in the case of serious crimes, the possibility exists that treatment records could be used in a subsequent prosecution of the client.
  
- K. Upon entering a drug court program, a client will be requested to sign a consent form which permits substance abuse treatment providers to disclose information about the client to drug court personnel, i.e. the judge, probation officer, prosecutor and defense attorney. Counsel should fully explain the waiver before the client signs it. Counsel should add language to the waiver that consent of the client is limited to use of the information in the drug court session, and the client does not consent to disclosure for use in any other context, including for any subsequent prosecution or criminal investigation.

**C. PERFORMANCE STANDARDS GOVERNING REPRESENTATION OF JUVENILES IN DELINQUENCY AND YOUTHFUL OFFENDER CASES**

These standards are intended for use by the Committee for Public Counsel Services in evaluating; supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications, including those published on the CPCS website. See <https://www.publiccounsel.net/>.

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## **1. GENERAL PRINCIPLES OF REPRESENTATION**

### **A. Role of Defense Counsel**

Counsel's role in the criminal justice system is to ensure that the interests and rights of the client are fully protected and advanced. Counsel's personal opinion of the client's guilt is totally irrelevant. The client's financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Counsel must know and adhere to all applicable ethical opinions and standards and comply with the rules of the court. Where appropriate, counsel may consider a legal challenge to inappropriate rules and/or opinions. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers. Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

The role of counsel in delinquency and Youthful Offender (YO) cases is to be an advocate for the child. Counsel should ensure that the interests and rights of the client are fully protected and advanced, irrespective of counsel's opinion of the client's culpability. This requires fully explaining to the juvenile the nature and purpose of the proceedings, using language that is appropriate to the client's age

and mental capabilities, and the general consequences of the proceedings, seeking all possible aid from the juvenile on decisions regarding court proceedings. Counsel should also fully explain to the juvenile all court proceedings, as well as all his/her rights and defenses, using language that is appropriate to the client's age and mental capabilities. Upon appointment, counsel should first seek to meet separately with the juvenile out of the presence of the parent.<sup>2</sup> Counsel should not discuss any attorney-client privileged communications with the parent, or any other person, without the express permission of the juvenile. Counsel should advise the juvenile of the above at the onset of the attorney-client relationship. Counsel should fully inform both the juvenile and the juvenile's parents about counsel's role, especially clarifying the lawyer's obligation regarding confidential communications, using language that is appropriate to the client's age and mental capabilities. The lawyer should counsel the juvenile, present the juvenile with comprehensible choices, help the juvenile reach his own decisions and advocate the juvenile's viewpoint and wishes (as determined by the juvenile) to the Court. Counsel should refrain from waiving substantial rights or substituting his own view, or the parents' wishes, for the position of the juvenile.

Counsel should engage in a holistic approach to their representation. Counsel should assist clients in achieving life successes. Life successes have proven to lead to better legal outcomes. Counsel should utilize Positive Youth Development, the leading science based framework for promoting life success for young people. As necessary, counsel shall investigate the availability of services or benefits provided by other public or private agencies or organizations and seek such services for the client. This should include educational advocacy in every case where school discipline, setting, program, services, and/or performance are relevant to the defense or disposition of the case.

## **B. Education, Training and Experience of Defense Counsel**

To provide competent representation, counsel must be familiar with Massachusetts criminal law and procedure, including changes and developments in the law. It is counsel's obligation to remain current with changes in the statutory and decisional law. Counsel must also have a strong understanding of adolescent brain development, including both scientific studies and case law. Counsel should participate in skills training and education programs in order to maintain and

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<sup>2</sup>The use of the word parent hereafter refers to parent, guardian, custodial adult or person assuming legal responsibility for the child.

enhance skills. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept the more serious and complex delinquency or youthful offender cases only after having had experience and/or training in less complex criminal/delinquency matters. Where appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of juvenile delinquency and criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel.

To provide competent representation in delinquency and YO matters, counsel must be familiar with G.L. c. 119, particularly sections 53-84 and G.L. c. 120 as well as relevant case law. Counsel should also be cognizant of the roles of the Department of Youth Services (DYS), Department of Children and Families (DCF), Department of Developmental Services (DDS), and Department of Mental Health (DMH). Counsel should be aware of the various service delivery systems and placement processes. Counsel should have a working knowledge of the law regarding: DYS classification procedures, Child Requiring Assistance (CRA), Care and Protection, school suspension and expulsion, special education, and DCF Fair Hearings. Counsel should be aware that each of these other areas of law and social service systems has a potential overlap with the delinquency/youthful offender proceedings.

### **C. General Duties of Defense Counsel**

The role of counsel is to ensure that the juvenile is afforded due process. Counsel should assert all rights and raise all issues in the context of the case where strategically appropriate. This includes the filing of motions, with supporting affidavit and memoranda and handling the delinquency or youthful offender proceedings generally in accordance with the standards for performance in criminal proceedings.

- i. Counsel's primary and most fundamental responsibility is to promote and protect the interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case. If personal reactions make it impossible for counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client. In such cases, counsel shall immediately notify the Bar Advocate Program and the YAD Trial Panel Director of the situation.

- ii. In order to properly prepare the client's case and to apprise the client of the progress of the case throughout its duration, counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. Meeting with the client at the courthouse is not a substitute for a visit to the place of confinement or meeting at a mutually convenient private location, which is necessary to establish and develop the attorney client relationship and to provide the same zealous representation as that provided to paying clients.

When counsel is assigned to represent a new client and the client is held in custody (e.g., detention center or other place of commitment for alcohol/drug or mental health evaluation), counsel should contact DYS and immediately write DYS a letter informing the agency that the client is represented by counsel, and that under no circumstances may anyone from the police, prosecutor, or Commonwealth speak with the client without counsel. In all cases where the client is held in custody, counsel should visit the client within three business days of receiving the assignment. For each client visit at a detention facility, either using the CPCS logbooks located in each DYS facility, or Counsel is required to sign in and out electronically through DYS. In those instances when it will not be possible for counsel to see a new in-custody client within three business days of assignment, the attorney must: (1) write to the client within three business days of receiving the assignment and advise the client that s/he has been assigned to the representation and also inform the client of the date upon which counsel will visit the client; (2) if appropriate, provide the client with a copy of discovery received in the case; and (3) counsel should call the DYS facility where his/her client is detained and speak to the client and inform the client of when he/she can expect a visit. Counsel should contact the juvenile within 24 hours of receiving an appointment. Counsel should also assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise counsel of the evidence and defenses in his/her case. Counsel must also arrange for prompt and thorough consultation with the parent or guardian, said consultation to be within parameters established by the client.

- iii. Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting an appointment. Counsel must maintain an appropriate, professional office in

which to consult with clients and witnesses and must maintain a system for receiving regular collect telephone calls from incarcerated clients. Counsel must provide incarcerated clients with directions on how to contact the office via collect telephone calls (e.g., what days and/or hours calls will be accepted). Counsel must anticipate that juvenile clients will require more contact between court dates than the average adult client.

In order to advise the client about decisions to assert or waive rights, to prepare the client to testify at any hearing, and to apprise the client of the progress of the case, counsel must meet with the client as needed and at reasonable intervals in private at counsel's office or at the client's place of confinement throughout the pendency of the case, and until the representation has concluded. Visits at "reasonable intervals" typically require more frequent visits with juvenile clients than with adult clients.

- iv. Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client. As part of this file, counsel should maintain a "running sheet" or log which records information such as information obtained during all interviews of the client; interviews of witnesses, interviews of family members, friends and employers; client's background and history; court dates and events; contact with investigators and results of investigations; conversations with the prosecutor regarding discovery, dispositional issues including plea offers, trial issues; conversations with the probation officer, lobby conferences or conversations with a judge; conversations with police officers or Commonwealth investigators; telephone conversations regarding the case; conversations, consultation and evaluation by experts, etc.
- v. Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner.
- vi. The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead delinquent or not delinquent and to change such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal; and whether to waive his/her right to a speedy trial.

- vii. The attorney should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is consideration of the client's input and full disclosure by the attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters.
- viii. Counsel's obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel and must, upon request, promptly provide successor counsel with the client's entire case file, including work product.
- ix. Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.
- x. Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared. Counsel should follow appropriate court practices to minimize inconvenience to any individuals.
- xi. Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g., motions to change venue, etc.
- xii. Where counsel is unable to communicate with the client or his or her guardian because of language differences, the attorney shall take whatever steps are necessary to ensure that he/she is able to communicate with the client and that the client is able to communicate his/her understanding of the proceedings. Such steps would include obtaining funds for an interpreter to assist with pre-trial preparation, interviews, and investigation, as well as in-court proceedings.
- xiii. Many delinquency and Youthful Offender cases can benefit from the assistance of a social worker. Counsel should file a motion for funds for a social worker to be retained to provide the following kinds of assistance:

conduct a biopsychosocial assessment of the client; write an aid in sentencing report for the client; conduct a needs assessment of the client, identify and refer to appropriate services; review and analyze client records; and/or interview collaterals and family members. A social worker, however, cannot be used to provide direct services such as therapy.

- xiv. Where counsel is unable to communicate with the client because of mental disability, the attorney shall obtain expert assistance for an evaluation of the client to determine what steps, if any, can be taken to improve communication and understanding to acceptable levels. If no steps can be taken, counsel should address the court on the issue of the client's competence. In obtaining the assistance of an expert, counsel shall move for funds for an independent expert, rather than a 68A court clinic evaluation, taking into consideration the dangers of a 68A referred to in [Juvenile Delinquency Performance Standard 2.a.vi\(c\)](#), below.
- xv. Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client and the court, and to minimize inconvenience to others.
- xvi. Counsel may request the appointment of a guardian ad litem, or may elect not to oppose such an appointment, only when very unusual circumstances warrant such an appointment. Every effort should be made to limit the role of the guardian ad litem to the minimum required for him/her to accomplish the purpose for which the appointment was made. In most cases both the guardian and the client should be instructed not to discuss the facts of the case as this discussion may not be privileged.

## **2. PRELIMINARY PROCEEDINGS & PREPARATION**

### **A. Arraignment**

- i. Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release (G.L. c. 276, §58) as well as the procedure for appeal of the court's decision. If the nature of the offense and/or the client's record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and inform the client of the exact charges; the

attorney should review the police report(s), and should review the client's probation [CORI] record, paying particular attention to any alleged convictions, incarcerations, defaults, pending cases, open probation matters and open restraining orders, and ascertain what other relevant information may be in the possession of the probation department or prosecution.

- ii. Counsel should familiarize him/herself with the particular arraignment practices of each session in which s/he appears. For example some courts routinely obtain school attendance records at arraignment.
- iii. Counsel should consider a motion to dismiss prior to arraignment. In 2013, the Supreme Judicial Court held that juvenile court judges may allow a motion to dismiss prior to arraignment. See *Commonwealth v. Humberto H.*, 466 Mass. 562 (2013). Accordingly, counsel should review the complaint application, prior to arraignment, to determine whether a motion to dismiss is appropriate.
- iv. In addition to meeting with the juvenile client, counsel should determine whether a parent is at the court in connection with the juvenile proceeding. Counsel should ascertain the adult's ability and willingness to assume custody of the juvenile or to post bail for the juvenile. Counsel should be aware that the court will usually release a juvenile to the care and custody of a parent. Counsel should also be aware that most juvenile courts will not release a juvenile without an apparently responsible adult in court willing to take custody. Every effort should be made to locate and contact such a responsible adult if none are present.
- v. In addition, counsel should be familiar with the law regarding bail revocation, pursuant to G.L. c. 276, § 58 and be prepared to raise constitutional issues. If the Commonwealth moves to revoke the client's bail on another case due to the new offense, counsel should determine whether or not there is a legal basis for such a motion. Counsel should be prepared to argue that the client facing bail revocation is entitled to the same process and the Commonwealth has the same burden of proof by clear and convincing evidence as a client facing § 58A preventive detention. Counsel should insist upon a hearing, notice and time to prepare and subpoena witnesses.
- vi. Counsel should strongly advise the client not to waive any significant rights at this proceeding, including whether to proceed with a jury trial or to have the case heard in the bench trial division.

- (a) A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare circumstances, and if the attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later, especially one which does not involve a criminal record such as diversion, drug evaluation under G.L. c. 111(e), mediation, or a continuance without a finding. However, counsel should be aware of potential immigration consequences of a continuance without a finding, which may be considered a conviction for immigration purposes.
  - (b) Where strategically appropriate and especially if the client may be held on bail, counsel should request a trial or pretrial hearing as soon as practicable within fifteen (15) days (G.L. c. 119, § 68). Counsel must discuss with the client his/her right to return to court within fifteen (15) days and may waive this right only after discussion with the client of the pros and cons of such a waiver.
  - (c) Counsel should be aware of G.L. c. 119, § 68A regarding pretrial evaluation of a juvenile. Counsel should be aware that evaluations performed under § 68A are readily available to SORB and that any party to a case may review a court clinic evaluation upon its completion, as long as there is not a protective order. As such, counsel should be extremely wary of these evaluations and, rather than ask for a referral to the court clinic, counsel should seek funds to hire his/her own evaluator. Control of the juvenile's information is essential. Should the court order a § 68A evaluation, counsel should be aware that it may only be ordered with the parent or guardian's consent; counsel should advise the juvenile's parents accordingly. Counsel should make every effort to assure that his/her client is not held in custody for a 68A evaluation. Counsel should also attend any meetings of the juvenile and the evaluator. Finally, in the event that a court clinic is ordered, counsel must protect the juvenile's rights relative to confidentiality and must seek protective orders to limit who has access to the report, and what information in the report can be shared with other parties; counsel should also seek protective orders requesting that counsel be notified when access to the evaluation is requested. Additionally, counsel should seek orders relative to the ultimate destruction of any report.
- vii. Counsel should be thoroughly familiar with the law and court practices regarding competence to stand trial and criminal responsibility (G.L. c. 123,

§§ 15(a) and 15(b); Mass. R. Crim. P. 14). Counsel should also be aware of, and protect, the client's statutory and constitutional rights with respect to such competency examinations. Counsel should be aware that children present special competency and criminal responsibility issues and should be alert for these issues. Counsel who is appointed to represent the client for bail only should give special consideration to these issues and should rarely, if ever, agree to such a commitment at the time of the client's arraignment.

- viii. Counsel should ensure that every client (and parent) is provided with a card noting the next court date, an office appointment date, any other important dates, as well as complete information on how to contact the attorney.
- ix. The assigned defense trial counsel should represent the client at any competency hearing arising in the case.

#### **B. Initial Interview and Preparation for Bail Hearing**

- i. The scope and focus of the initial interview will vary according to the circumstances under which it occurs. A meeting or conversation conducted in a courthouse hallway or lockup is not a substitute for a thorough and timely interview conducted in the attorney's office or a similar private and appropriate setting.
- ii. If identification may be an issue, counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.
- iii. If the client may be detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of bail and/or pretrial conditions of release. Such information should generally include:
  - (a) client's residence and length of time at that residence;
  - (b) family (names, addresses and phone numbers);
  - (c) health (mental and physical) and employment background;
  - (d) explanation of any court defaults and any other information on the record;
  - (e) probation/DYS/CRA status;
  - (f) possible sources of bail money;
  - (g) the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred;

- (h) client's legal custody (parent, family, state agency) and physical custody (person responsible to supervise client) - names, addresses and phone numbers;
  - (i) client's school placement, (G.L. c. 71B); status, attendance, special ed. designation;
  - (j) possible adults willing to assume responsibility for the juvenile and/or post bail;
  - (k) the names and addresses of any agencies involved with the child and/or parent, e.g. DCF worker, DMH worker, community health center, etc.;
  - (l) the client's reputation in the community; and
  - (m) whether the client's family, friends, teacher, or employer are present in the courtroom.
- iv. Such information should be verified whenever possible.
  - v. Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege. Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone, including family members, friends, and fellow detainees, unless counsel advises otherwise. Counsel should inform the client of the right to request that his/her attorney be present at any interview or questioning.
  - vi. Counsel should obtain signed releases by the client and parent for mental health records, school records, DCF records, DYS records, employment records, etc. Counsel should advise the client of the potential use of this information and the privileges that attach to this information.

### **C. Bail or Detention Hearing**

- i. Counsel has an obligation to vigorously attempt to secure the pretrial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery.
- ii. Counsel's argument to the court should include the client's ties to the community and other factors that support a conclusion that the client, if released, will return for future court appearances. The client should not,

except in the judgment of very experienced counsel, under the most extraordinary circumstances, testify at a bail hearing. Although comments on the strength and quality of the Commonwealth's case are necessary and appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client's defense should not be revealed at the arraignment or bail hearing. Counsel should, where appropriate and helpful, identify people who are in the courtroom on behalf of the client.

- iii. Counsel should be prepared to address the special issues of dangerousness that are the focus of hearings under G.L. c. 276, § 58A, and, where appropriate and possible, be ready to present proffers that address those issues. Counsel should be prepared to address the issue of bail revocation pursuant to G.L. c. 276, § 58. Counsel should also be prepared to address the issue of detention related to a preliminary probation violation hearing.
- iv. Counsel should consider and advocate for reasonable conditions of release or recognizance such as pre-trial probation, electronic monitoring, stay away orders, curfews, mental health treatment with appropriate protective orders, substance abuse treatment with appropriate protective orders, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties. Counsel must discuss these conditions of release with the client prior to suggesting them at the hearing.
- v. G.L. c. 276, § 8 controls both juvenile and adult proceedings. Counsel should be aware that the statute provides for a presumption of personal recognizance. The focus of the bail hearing should be whether the juvenile will appear for further court proceedings. Counsel should oppose any bail order which is in the nature of preventive detention, such as "DCF or DYS only cash bail," or any bail order where the purpose of detention is ostensibly for treatment. Counsel should be careful in considering whether a parent only cash bail is tantamount to preventive detention.
- vi. Even if release is not effected, counsel should advocate for the least amount of bail the amount of bail and type of charge may determine the type of facility where the juvenile will be held, i.e., lower bail may result in a less restrictive setting within DYS.
- vii. Bail appeals must be considered in every case where bail is imposed and the client is detained.

- viii. Where the client is not able to obtain release under the conditions set by the court, counsel should advise the client of his/her right to appeal under G.L. c. 276, §§ 58 and 58A and the advantages and disadvantages of doing so. Where appropriate, counsel should facilitate the bail appeal procedure, including pressing for the right to be heard on the same day and be prepared to represent the client at the hearing. It is crucial that counsel learn the bail appeal procedures applicable to each jurisdiction in which they practice. If counsel cannot represent the client at the bail appeal, s/he should assure that the counsel who does has all information necessary before proceeding with the bail appeal.
- ix. Counsel must make every effort to represent the client at the Bail Appeal.
- x. Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court, the sheriff, and DYS to any special needs of the client, e.g. medical problems and request the court to order appropriate measures. Counsel should follow-up with the client and the facility to ensure that the client's needs are being addressed.
- xi. Counsel should be aware that juveniles can be released on bail or personal recognizance, and with his/her consent placed on pre-trial probation pursuant to G.L. c. 276, § 87. Counsel should protect the client's rights at this important stage. Counsel should make sure that if conditions are imposed they should be reasonable. Counsel should fully explain the conditions to the client in language that is appropriate to the client's age and mental capabilities, and the client should be able to communicate his/her understanding of these conditions. If there is a violation of the conditions, counsel should be aware of the procedures for revoking bail. *Jake J. v. Commonwealth*, 433 Mass. 70 (2000).

**D. Preliminary Discovery Issues/Prosecution Requests for Non-Testimonial Evidence**

- i. Counsel should carefully examine and seek copies of all pertinent and available court papers and police reports. If the police report is redacted, counsel should move for the names and addresses of all witnesses. Counsel should seek preservation and/or discovery of evidence (such as visible injuries) likely to become unavailable unless special measures are taken. Where appropriate, counsel should request court orders for preservation of

evidence, e.g. "911" or "turret" tape recordings, notes of investigating officers, and biological/forensic evidence. Counsel should be aware of the potential for loss or destruction of evidence by forensic examination or testing and take appropriate steps to prevent or minimize it. Counsel should know and protect the client's rights governing the prosecution's efforts to require a defendant to submit to procedures for gathering non-testimonial evidence, such as lineups or other identification procedures, handwriting exemplars, physical specimens, etc.

- ii. Counsel should be aware that G.L. c. 119, § 55A requires that discovery be in writing, and counsel should request that this requirement be honored.

### **E. Special Concerns**

- i. Upon assignment to a new client who is already committed to the Department of Youth Services, counsel shall request and review the client's CARI and committing Mittimus in order to ensure the youth's previous sentence comports with G.L. c. 119, § 58. Counsel shall correct any errors discovered. Counsel may contact YAD for assistance.
- ii. Particularly if the client is detained, counsel should consider a prompt motion to dismiss any charge or aggravating element that is not supported by probable cause.
- iii. Where appropriate, counsel should consider the advantages and disadvantages of seeking cross-complaints.
- iv. Counsel should be aware of the special privacy considerations given a juvenile; i.e., G.L. c. 119, § 65 requires that all delinquency hearings be closed to the general public.
- v. Counsel should be aware that delinquency papers are not public documents; however they can be released with the consent of the court. After two findings of delinquency on felony charges, the probation officer may make public the juvenile's name when the juvenile is charged with a third felony. (See G.L. c. 119, § 60A). Youthful Offender cases are not open to the public until the juvenile has actually been indicted.
- vi. Counsel should consider obtaining funds for an interpreter (if the client, client's family, or potential witnesses do not speak English), investigator,

social worker, expert (e.g., psychologist or educational specialist) at arraignment, if immediate investigation of the allegations is necessary, or if immediate psychological/psychiatric/biopsychosocial evaluation of the client is warranted.

- vii. Counsel should take advantage, where appropriate, of opportunities to interview witnesses who may be present in court. Counsel must avoid becoming a witness in his/her own case. Therefore, interviews of prosecution witnesses should be “witnessed” by another person (e.g. another defense attorney) to avoid later problems with proving an impeaching statement at trial.

### **3. TRANSFER HEARING PURSUANT TO G.L. C. 119, § 72A**

Transfer generally only arises in the context of G.L. c. 119, § 72A. This statute controls the prosecution of cases in which the alleged act took place prior to the defendant’s 18th birthday, but he/she was not "apprehended" until after his/her 19th birthday. The decision whether to prosecute the defendant as an adult or to discharge him/her has dramatic consequences. Counsel should prepare accordingly, and counsel should be YO certified. Counsel should also be prepared to follow the case to Superior Court if the case is ultimately transferred, and to prepare Motion(s) to dismiss in both the Juvenile and Superior Court. Counsel should raise juvenile brain development defense and use experts to support those assertions. If counsel, for some reason, cannot follow the case to Superior Court, the Youth Advocacy Division should be notified immediately.

#### **A. Initiation of Transfer Hearing Request**

Counsel should be prepared to argue strenuously to the court, as well as to the assistant district attorney, that the case should not be heard as a transfer hearing under G.L. c. 119, § 72A, because the Commonwealth made an inadequate effort to bring the defendant into court before his/her 19th birthday or because such a proceeding would not be in the interests of justice.

#### **B. Transfer Hearing – Part A**

- i. Counsel should be aware that transfer under G.L. c. 119, § 72A, requires the judge to make a finding of probable cause that the defendant committed the charged offense. Counsel should always seek a complete and recorded probable cause hearing except in the most extraordinary circumstances. Counsel should order a copy of the tape or transcript. In many courts it will

be appropriate to request a stenographer to assure a record of the hearing, given the poor quality of the recording systems throughout the state. Counsel should also argue that there is no statutory provision for substituting Grand Jury minutes for a hearing and that even if the Grand Jury minutes are admitted into evidence the defendant is still entitled to cross-examine the Commonwealth's witnesses and call any other relevant witnesses.

- ii. Counsel should refer to section 3, [Probable Cause Hearings](#) of the Standards for Criminal Practice, for other issues relating to preparation for the hearing. The Standards for Criminal Practice can be found in this manual, and on the CPCS website at <https://www.publiccounsel.net/>.

### **C. Transfer Hearing-Part B**

- i. Counsel should be aware of the statutory findings (protection and interests of the public) that G.L. c. 119, § 72A requires the judge to make. Counsel should be prepared to argue that the judge should consider, but is not limited to, the following factors: (i) the seriousness of the alleged offense; (ii) the child's family, school and social history, including his court and juvenile delinquency record, if any; (iii) adequate protection of the public; (iv) the nature of any past treatment efforts for the child; and (v) the likelihood of rehabilitation of the child. *Commonwealth v. A Juvenile*, 16 Mass. App. Ct. 251 (1983).
- ii. Counsel must have up-to-date knowledge of the statutory and case law governing these findings.
- iii. Counsel shall, at a minimum, review, and unless inappropriate, obtain copies of the client's psychosocial evaluations, social services records, psychological reports and evaluations, placement or program evaluations and reports, school records, and medical history. Protective orders concerning access to and prosecutorial use of such information should be requested. Counsel should consider moving under G.L. c. 261, §§ 27A-G, *ex parte*, if possible, for independent evaluations, reports and histories. Counsel shall also facilitate and make substantial efforts to secure services through school, community agencies, DCF, DYS, or DMH, as appropriate.
- iv. Counsel should be prepared to present testimony by people who can provide helpful insight into the client's character, including: teachers, athletic personnel, counselors, DYS counselors, psychologists, community members,

DCF and/or DMH counselors, probation officers, religious affiliates, employers, or other persons with a positive personal and/or professional view of the defendant.

- v. Counsel should be certain that all Part B proceedings are recorded. Counsel's file should contain notes of names, addresses and essential testimony at the Part B proceeding. Due to the inadequacies of recording systems and the importance of the hearing, counsel should consider a motion for funds to obtain a court reporter. See [§7\(a\)\(v\)\(c\)](#) of these standards.
- vi. Counsel shall order the tape or transcript of Part A & B proceedings.
- vii. Counsel should request written findings of fact by the Court, should the case be transferred to adult court.

#### **D. Post Transfer Responsibilities**

- i. After dismissal of the juvenile complaints, the youth is arraigned on adult charges; counsel should be prepared to argue bail.
- ii. Counsel shall carefully review the judge's findings to determine if the order of transfer is deficient. Where findings are deficient, counsel should file a Motion to Dismiss and/or Remand to Juvenile Court under G.L. c. 277, § 47A.
- iii. Counsel's motion, affidavit and memorandum should set forth relevant testimony or materials, or refer to the lack thereof, presented at the hearing. Because these motions are not de novo proceedings, relevant portions of the hearing should be appended. If new counsel is representing the youth he/she should confer with prior counsel who represented the client in the juvenile court and review the proceedings in detail. Counsel should ascertain whether there have been any significant personal or family changes arising since the conclusion of the juvenile court proceedings. Counsel should secure any further evaluations or other materials that are in the youth's best interest. New counsel should, as appropriate, confer with any representatives of state agencies or others involved with the youth.
- iv. If the court denies the Motion to Dismiss and/or Remand, counsel should consider an appeal to the Supreme Judicial Court pursuant to G.L. c. 211, § 3 and relevant case law.

## **4. YOUTHFUL OFFENDER PROSECUTIONS**

### **A. Appointment of Counsel**

Counsel should be aware of the criteria established by G.L. c. 119, §§ 52, 54, and 58, regarding which cases are eligible for Youthful Offender prosecution. Counsel should also be aware of all procedural differences between delinquency and youthful offender prosecutions. Only attorneys who have been certified for YO cases may accept a case in which YO prosecution is possible. Counsel must be familiar with the most up-to-date list of [CPCS presumptive YO offenses](#), and Counsel must comply with CPCS policies and procedures with respect to YO assignments. See the [Certification Chapter](#) of this Manual, which can be found at <https://www.publiccounsel.net/>.

### **B. Limiting Consequences of Indictment**

- i. Counsel should at the earliest opportunity make every effort to advise the client of the ramifications of a YO prosecution. Counsel should assess the strength of the Commonwealth's case as quickly as possible in order to assist the client in pre-indictment plea bargaining.
- ii. Counsel should be prepared to develop dispositional material quickly, if it might be of assistance in persuading the Commonwealth not to pursue a Youthful Offender indictment. Counsel should be aware of the indictment policies of the County in which the case is pending and be prepared to initiate pre-indictment plea negotiations at the appropriate time in the appropriate cases.
- iii. In the event of a Youthful Offender indictment, counsel should prepare the case for trial in the same manner that a case is prepared for trial in the Superior Court. Pretrial preparation includes discovery motions, investigation, substantive motions, client preparation, etc. See [Section 5](#). Pretrial Preparation, [below](#).

### **C. Youthful Offender Sentencing**

- i. Simultaneous with the trial preparation, counsel should be preparing for a sentencing hearing. This process needs to begin prior to adjudication, because it is time-consuming to obtain records, background information, psychological evaluations, and the like. Counsel should remain on the lookout

for information which might persuade the Commonwealth to agree to a dismissal or *nolle pros* of the indictment and reinstatement of the delinquency complaint.

- ii. Counsel should be aware that G.L. c. 119, § 58, states that upon a defendant being adjudicated to be a Youthful Offender, the Court "shall conduct a sentencing recommendation hearing." This hearing is to "determine the sentence by which the present and long-term public safety would be best protected." Counsel should be ready to address the factors outlined in the statute as well as any other factors (helpful or otherwise) which the Court might or ought to consider. At all times counsel should keep in mind that tactical decisions regarding the sentencing process should be based on the client's stated goals.
- iii. Counsel should take all necessary steps to prepare for the sentencing hearing. This may include: obtaining funds for an independent psychological evaluation, obtaining funds for a psycho-social evaluation by a LICSW or other qualified professional, sharing information with the probation office responsible for preparing a report for the Court, assisting with a court-ordered Court Clinic Evaluation, etc. This may also involve asking DYS to make a pre-adjudication classification decision.
- iv. Counsel should be prepared to argue that the youthful offender provisions of G.L. c. 119 permit DYS commitments to be suspended, even for firearm offenses. Counsel should be aware that the mandatory commitment language in G.L. c. 119, § 58, for gun offenses is for delinquency adjudications; the statute is silent as to whether mandatory commitment also applies to youthful offender adjudications.
- v. Counsel should recognize that a juvenile disposition is almost, but not always, better than an adult disposition. Counsel should approach sentencing creatively and should advise clients about both short and long term consequences of sentencing, particularly when dealing with adult suspended sentences.
- vi. Counsel should be aware that the court is required (G.L. c. 119, § 58) to make written findings stating its reasons for the sentence imposed. Counsel is well-advised to consider filing proposed findings.

- vii. Counsel should be prepared to withdraw a defendant capped plea or seek a stay of sentence and/or file an appeal of the sentence if the findings are inadequate.
- viii. Counsel shall ensure youth's sentence comports with G.L. c. 119, § 58. Subsequent to the hearing, counsel shall request and review the youth's CARI and Mittimus (if applicable) to confirm the accuracy and legality of the disposition.

#### **D. Youthful Offender Indictment**

- i. Counsel should be aware of the three factors G.L. c. 119, § 54, requires for a youthful offender indictment.
- ii. Counsel should thoroughly review the grand jury minutes to evaluate whether the prosecution presented sufficient evidence to satisfy the requirements of § 54.
- iii. Counsel should be aware of the current case law regarding motions to dismiss youthful offender indictments. *Commonwealth v. Quincy Q.*, 434 Mass. 859 (2001).
- iv. Counsel should also be aware that the three factors required in section 54 must be proved beyond a reasonable doubt at trial.

### **5. PRETRIAL PREPARATION**

#### **A. Investigation**

Counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities as well as from witnesses identified by the client or by others. Counsel should consider obtaining funds for an investigator to interview witnesses, while being aware of his/her reciprocal discovery obligations. Counsel should go to the scene of the alleged crime in a timely manner, prior to the pre-trial hearing when necessary, or prior to an evidentiary hearing or trial. Counsel should consider obtaining fair and accurate photographs, fair and accurate maps of the area and, where relevant, measurements.

## **B. Probation Surrender Hearings**

- i. Counsel appointed to represent a client charged with violation of his/her probation should prepare in the same way and with as much care as for a trial. Counsel must request time to: (i) conduct an in-person interview with the probationer; (ii) discover and review the Probation Department file; (iii) discover and review records of the probationer's participation in mandated programs; (iv) obtain expert assistance to test the validity of scientific evidence underlying the surrender (e.g., urinalysis results); and (v) identify, locate, and interview exculpatory or mitigating witnesses, etc. Counsel should consider selecting a date for the final hearing that allows the client sufficient time to work towards compliance with the conditions of probation.
- ii. Counsel shall be familiar with the Juvenile Court Standing Orders for Probation Violation Proceedings. See G.L. c. 218, § 59.

Per the Juvenile Court Standing Order for Probation Violation Proceedings, most judges will not allow the violation of probation hearing to track a new offense. Therefore, counsel must prepare for the final hearing based upon the facts of the new offense and familiarize him/herself with the case law regarding admissibility and sufficiency of hearsay in these proceedings. If counsel does not represent the client on the new offense, counsel should contact the attorney who does represent the client on the new offense to discuss the hearing, possible discovery issues, possible defenses and possible consequences of a finding of a violation of probation.

- iii. At the final probation surrender hearing, counsel shall ensure youth's sentence comports with G.L. c. 119, § 58. Subsequent to the hearing, counsel shall request and review the youth's CARI and Mittimus (if applicable) to confirm the accuracy and legality of the disposition.

## **C. Pre-Trial Motions and Affidavits**

Counsel should file any motions that are strategically and legally appropriate. The decision to file motions should be made only after appropriate investigation (including client interview, examination of court documents and other material obtainable through informal means and summons) and researching relevant law. Counsel must be familiar with the requirements of the Massachusetts Rules of Criminal Procedure, including time limits and affidavit requirements. If more time is needed, it should be requested. Before filing a pretrial motion and affidavit,

counsel should be aware of any adverse potential effects, such as its impact on the defendant's speedy trial rights or the opportunity a motion may provide the Commonwealth to preview and strengthen a weak case. Counsel should also be aware of the adverse consequences that may attend the failure to file motions, such as "waiver" of rights or defenses. Affidavits should be drafted with care to protect the client's Fifth Amendment rights and to avoid disclosing trial strategy.

#### **D. Pre-Trial Conference Reports**

If a pretrial hearing is ordered, counsel should be cognizant of the requirements of Mass. R. Crim. P. 11. Counsel should carefully scrutinize and amend any pretrial conference forms to comport with fairness and case law and to protect the client's best interests. Counsel should amend pretrial conference report forms to accurately reflect counsel's reciprocal discovery obligations pursuant to Mass. R. Crim. P. 14 (a)(3) and relevant case law.

#### **E. Discovery Motions**

Among the discovery material counsel should consider seeking, through motions if necessary, are the following items that may be in the custody or under the control of law enforcement or other prosecution agents or agencies:

- i. details of all identification procedures, including examination of any photographs shown and selected;
- ii. written and oral statements of defendant/co-defendant(s);
- iii. copies of statements by potential witnesses;
- iv. copies of all official reports, e.g., police, arson, hospital, results of any scientific test;
- v. inspection of physical evidence;
- vi. list of potential witnesses and addresses;
- vii. names and addresses of any witnesses, including proposed police officer experts, expected to offer expert opinions and the substance of their anticipated testimony (including their curriculum vitae/resume, materials used or relied upon in reaching their opinion and the factual and scientific basis for their opinion);
- viii. probation records of all potential witnesses;
- ix. copies of Grand Jury minutes;
- x. exculpatory evidence, identified as specifically as possible, and including promises, rewards, and inducements made to witnesses;

- xi. any other items that would be helpful in preparing and trying the case (e.g., audio or videotapes of interviews, booking, scenes, etc.);
- xii. notice of prior or subsequent bad act evidence; and
- xiii. notice of excited utterance evidence.

## **F. Reciprocal Discovery**

Counsel must be familiar with the rules and developing body of case law regarding reciprocal discovery. Counsel must be aware of, consider, and thoroughly research any potential obligations and time limits regarding reciprocal discovery (Mass. R. Crim. P. 14[a][3]).

## **G. Substantive Pretrial Motions**

Among the motions that counsel should consider are:

- i. nonsuggestive identification procedures (e.g., lineup or its equivalent, testimony with client out of view, etc.) where strategically indicated and desired by the client;
- ii. dismissal for unconstitutionality of the statute;
- iii. dismissal for insufficiency of the complaint or indictment;
- iv. dismissal for insufficiency of the evidence presented to the grand jury/magistrate resulting in indictment/complaint, including insufficiencies under *Commonwealth v. Quincy Q.*, 434 Mass. 859 (2001); or for impairment of the integrity of the grand jury;
- v. request for speedy trial or dismissal for lack of speedy trial either for violation of Rule 36 or on constitutional grounds;
- vi. severance or joinder of defendants or charges;
- vii. suppression of evidence obtained in violation of federal and Massachusetts law, i.e., (i) illegally seized evidence, (ii) "un-Mirandized" or involuntary statements, (iii) statements made where an "interested adult" was not present or did not adequately advise the juvenile, (iv) identifications procured by impermissibly suggestive procedures. Counsel should take care to consider issues which may be unique to juvenile defendants such as the "interested adult rule" and school search scenarios;
- viii. funds for experts, investigators, interpreters, etc., under G.L. c. 261, §§ 27A - 27D. Counsel should consider retaining experts as consultants to aid in trial preparation, not only as witnesses. Counsel should be aware of the procedures for appealing the denial of a motion for funds;

- ix. Counsel should pay particular attention to any competency issues and file motions for funds accordingly;
- x. Counsel should also consider motion for funds for social workers and/or psychologists to aid in the preparation and disposition of the case; and
- xi. Any other issues that are appropriate.

## **H. Trial Motions**

- i. Counsel should be aware that certain motions are generally reserved for the trial judge, e.g., motions *in limine* and motions to sequester.

## **I. Motion Hearings**

When a dispute on a motion requires a hearing, counsel's preparation should include:

- i. investigation and discovery necessary to advance the claim, including visits to any scenes relevant to the subject matter of the motion;
- ii. careful research of appropriate case law which supports or expands rights guaranteed by the federal and state constitutions and/or the Massachusetts Rules of Criminal Procedure;
- iii. subpoenas for pertinent evidence and witnesses;
- iv. full understanding of the burdens of proof and evidentiary rules;
- v. careful consideration of the benefits/costs of having the client testify;
- vi. careful preparation of any witnesses who are called, especially the defendant;
- vii. submission of a memorandum of law. (In some cases, a memorandum is required; in most cases it is advisable.) Proposed findings of fact and law are often advisable, as well.

## **J. Discovery Compliance**

Once counsel's discovery motions are allowed, if appropriate, counsel should seek prompt compliance and/or sanctions for failure to comply. G.L. c. 119, § 55A, provides that Commonwealth's discovery responses be in writing upon motion of the juvenile or the court's own motion.

## **K. Interlocutory Relief**

Where appropriate, counsel should consider seeking interlocutory relief, under the applicable Rule or statute, after an adverse pretrial ruling. The conduct of interlocutory hearings, including the submission of briefs and oral argument, is

ordinarily the responsibility of trial counsel, whether the hearing was initiated by counsel or by the prosecution. Trial counsel handling an interlocutory appeal should contact the YAD Director of Appeals to determine whether assistance by appellate counsel is warranted.

## **L. Sentencing**

Counsel should begin gathering information relative to possible sentencing as soon as possible. This should include, but not be limited to, obtaining any and all relevant school records, background information, psychological evaluations, and the like. See [§ 4.c](#), ¶¶ 1 – 7, and [§ 8.a](#), ¶¶ 1 – 16.

## **6. DISPOSITIONS BY PLEA OR ADMISSION**

### **A. Plea Negotiations**

- i. After interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.
- ii. Counsel should inform the client of any plea negotiations before they occur unless it is impractical to do so, in which case counsel should inform the client of the negotiations as soon after they occur as is possible.
- iii. Counsel is responsible for fully explaining to the juvenile the concept of plea bargaining in general, as well as the details of any specific plea offer made to him/her. Counsel must use language appropriate to the client's age and mental capabilities.
- iv. The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based solely on the client's acknowledgement of guilt or solely on a favorable disposition offer.

- v. Where negotiations are begun, counsel should attempt to obtain the most favorable disposition possible for the client. The client shall be kept informed of the status of the plea negotiations.

## **B. Client Decisions**

- i. Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change his/her position. If the client remains unpersuaded, however, the attorney should assure the client he/she will defend the client vigorously.
- ii. Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or admitting to sufficient facts by any means, including, but not limited to, overstating the likelihood of conviction or potential consequences, or by threatening to withdraw from representing the accused if he/she decides not to accept the proposed agreement and to proceed to trial. It may be appropriate in rare cases to write a letter to the client outlining counsel's advice and the basis therefore.
- iii. Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were going to proceed to trial on the merits.

## **C. Preparation**

- i. When a client decides to offer a change of plea, or admit to sufficient facts, counsel must fully explain to the client all aspects of the plea agreement, if any, including sentencing recommendations, using language appropriate to the client's age and mental capabilities. Counsel must carefully prepare the client to participate in the procedures required under Mass. R. Crim. P. 12 and used in the particular court. Counsel shall also ascertain and advise the client of the court's practices concerning sentence recommendations and withdrawing pleas or admissions.
- ii. In advising a juvenile defendant regarding the consequences of a plea agreement, counsel must fully explain to the client, using language appropriate to the client's age and mental capabilities, DYS placement policies including: the classification grid, "staffing", classification, secure

treatment, residential treatment, tracking, Grant of Conditional Liberty (GCL), and revocation of GCL.

- iii. Before advising the prosecution and court that the client is willing to offer a change of plea or an admission to sufficient facts, counsel must also be satisfied that the plea is voluntary, that the client understands the nature of the charges, that there is a factual basis for the plea or the admission, that the witnesses are or will be available, and that the client understands the rights being waived including: a trial with or without a jury where the Commonwealth has the burden of proving guilt beyond a reasonable doubt, the right to confront witnesses, and the privilege against self-incrimination.
- iv. Counsel should negotiate the statement of facts with the prosecutor, advocating for language most favorable to the client. Counsel must also fully review the statement of facts with the client, and prepare him/her for the specific language to be used in court.

#### **D. Consequences of Conviction**

Counsel must also fully advise the client of the consequences of a conviction, including:

- i. the maximum possible sentence of all offenses;
- ii. mandatory minimum sentences where applicable;
- iii. effects of adult sentences on juvenile defendants;
- iv. different or additional punishments where applicable, such as for second offenses, probation violation or parole revocation consequences;
- v. potential liability for enhanced punishment after subsequent arrest, i.e., adult habitual offender, armed career criminal, second and subsequent offenses;
- vi. possible Federal charges or penalty enhancements;
- vii. conviction consequences for non-citizens (G.L. c. 278, § 29D);
- viii. Sex Offender Registration Act (G.L. c. 6, §§ 178C, et seq.) and DNA Seizure and Dissemination Act (G.L. c. 22E) requirements. As to the Sex Offender Registry Act, counsel should be aware that if delinquency or youthful offender adjudication does not result in confinement, under G.L. c. 6, § 178E, paragraphs e-f, you are entitled to a judicial determination that the juvenile does not pose a risk of re-offending and therefore is relieved from registering. Upon written motion by the Commonwealth, a judge may relieve a juvenile from registering, even if sentenced to confinement;

- ix. parole eligibility (including the discretionary nature of parole decisions and that being eligible for parole does not confer a right to parole);
- x. potential civil liabilities;
- xi. potential housing consequences for the defendant and his/her family;
- xii. potential loss or suspension of driving license;
- xiii. potential school suspension or expulsion consequences (G.L. c. 71, §§ 37H and 37H1/2);
- xiv. potential eligibility for youthful offender indictment in future cases;
- xv. potential risk of the Commonwealth seeking civil detention pursuant to the SDP (sexually dangerous persons) law (G.L. c. 123A);
- xvi. potential risk of life time community parole;
- xvii. potential adverse consequences on the client's employment or education; and
- xviii. possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States.

#### **E. Necessity of Admission of Guilt**

Where the proceeding is a final adjudication, counsel should not advise the client to plead guilty unless the client either admits guilt to counsel, admits guilt to the court in a colloquy, only admits to sufficient facts, or tenders an Alford plea. During and after the change of plea colloquy, counsel must vigorously enforce all aspects of a plea agreement. Where a change of plea is contingent upon a specific agreement, counsel must be sure that the court is so informed before the tender of the plea, and that the agreement is duly recorded.

#### **F. Disposition Argument**

Notwithstanding a disposition by plea or an admission to sufficient facts, counsel must be prepared for sentencing arguments, including, where appropriate, argument for release pending sentencing or appeal.

### **7. TRIAL PROCEEDINGS**

#### **A. General Trial Preparation**

- i. Counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:

- (a) summoning all potentially helpful witnesses, utilizing *ex parte* procedures if advisable (Mass. R. Crim. P. 17);
  - (b) summoning all potentially helpful physical or documentary evidence;
  - (c) arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful; e.g., testing of physical evidence, opinion testimony, etc.;
  - (d) obtaining and reading transcripts and other records of prior proceedings in the case or related proceedings;
  - (e) obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects, or information which may aid the fact finder in understanding the defense case and preparing to secure the admission of such evidence through witnesses who will testify at trial.
- ii. Where appropriate, counsel should have the following materials organized and accessible at the time of trial:
- (a) copies of all relevant documents in the case;
  - (b) relevant documents prepared by investigators;
  - (c) proposed *voir dire* questions;
  - (d) motions *in limine*;
  - (e) outline of opening statement;
  - (f) cross-examination plans for all possible prosecution witnesses;
  - (g) motion for required finding of not guilty, renewed motion for required finding of not guilty, and outline of argument for required findings of not guilty and authorities supporting it;
  - (h) direct examination plans for all prospective defense witnesses;
  - (i) copies of defense subpoenas;
  - (j) prior statements of all prosecution witnesses (e.g., Grand Jury minutes transcripts, police reports);
  - (k) prior statements of all defense witnesses;
  - (l) reports from defense experts;
  - (m) a list of all defense exhibits, and the witnesses through whom each will be introduced;
  - (n) proposed jury instructions with supporting case citations;
  - (o) copies of all relevant statutes and cases, including statutes and cases relating to any potential lesser- included offenses; and
  - (p) outline or draft of closing argument.

- iii. Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial.
- iv. If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant, prior or subsequent bad acts, reputation testimony, excited utterances, prejudicial evidence) and, where appropriate, counsel should prepare motions *in limine* and memoranda for such advance rulings.
- v. Counsel should be alert to and understand the importance of establishing, for appellate purposes, a complete record of the trial proceedings, and to be fully informed of the applicable law and practice regarding:
  - (a) preservation of each type of objection at every stage of the proceedings;
  - (b) offers of proof regarding evidence ruled inadmissible;
  - (c) recording of trial proceedings. Counsel should be aware that tape recordings of court proceedings often prove to be inaudible or unreliable. Accordingly, counsel should make every attempt to obtain a stenographer, rather than rely only on a tape recording. G.L. c. 261, § 27(c); G.L. c. 218, § 27A.

## **B. Sequestration**

Unless tactically inadvisable, counsel shall seek sequestration of all witnesses (including police, if possible) for trial (Mass. R. Crim. P. 21).

## **C. Bench Trial or Jury Trial**

- i. The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel. See Section 6, [Dispositions by Plea or Admission](#); Section 1, [General Principles of Representation](#).
- ii. Counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Counsel should be knowledgeable about and advise the client of the practices of the judge before whom the case may be tried. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.

## D. Voir Dire and Jury Selection

### i. Preparation

- (a) Counsel should be familiar with the law governing the selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire.
- (b) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, including Superior Court Rule 6, and should be alert to any potential legal challenges to those procedures.
- (c) Prior to jury selection, counsel should seek access to the juror questionnaires that have been completed by potential jurors.
- (d) Counsel should develop and file in advance of trial written *voir dire* questions tailored to the particular case.
- (e) Counsel should be familiar with the law concerning *voir dire* inquiries so as to be able to defend any request for particular questions.
- (f) Counsel should consider asking for extra peremptory challenges.
- (g) Counsel should consider requesting appropriate *voir dire* questions regarding the prospective jurors' attitude regarding the juvenile's age and credibility, as well as attitudes toward juvenile crime and whether the Juvenile Court is lenient with juvenile cases.
- (h) Counsel should be familiar with varied practices in this area (e.g., use of juror questionnaires and attorney-conducted *voir dire*) and should attempt to employ these where appropriate.

### ii. Examining the Prospective Jurors

- (a) Counsel should be familiar with case law that requires individual *voir dire* in certain cases, e.g., inter-racial murder or other inter-racial cases, or sexual assault cases, sexual assault on children, "insanity" defenses.
- (b) Where appropriate, counsel should consider seeking permission to personally *voir dire* the panel, or at the very minimum, if the court poses questions, to ask follow-up questions.
- (c) When appropriate, counsel should consider requesting individual juror *voir dire* even when case law does not require it, particularly if the proposed *voir dire* questions may elicit sensitive information or expose prejudices. Counsel should be familiar with case law supporting such requests.

- (d) Counsel should be familiar with case law regarding the client's right to be present during individual *voir dire*. Counsel should fully discuss the risks and benefits of asserting this right with the client.

iii. Challenges

- (a) Counsel should challenge for cause all persons about whom a legitimate argument can be made for prejudice or bias.
- (b) When challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors, and where appropriate, ask for additional challenges.
- (c) In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
- (d) Counsel should make every effort to consult with the client in exercising challenges.
- (e) Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.
- (f) Counsel should be aware that the number of challenges in a juvenile case is governed by Mass.R.Crim.P. 20(c)(1) and G.L. c. 119, § 56(e).

**E. Opening Statement**

- i. Counsel should consider the strategic advantages and disadvantages of making an opening statement, of disclosing particular information during the opening, and of deferring the opening statement until the beginning of the defense case. Except in extraordinary circumstances, counsel should make an opening statement.
- ii. Counsel should be familiar with the law governing opening statements, particularly in a case where counsel does not plan to present any affirmative evidence. In addition, counsel should attempt to be familiar with individual trial judges' practices regarding the permissible content of opening statements.
- iii. Counsel's objectives in making an opening statement may include the following:
  - (a) to provide an overview of the theory of the defense case;

- (b) to summarize the testimony of witnesses and the role of each in relationship to the entire case;
  - (c) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
  - (d) to identify the weaknesses of the prosecution's case;
  - (e) to remind the jury of the prosecution's burden of proof;
  - (f) to clarify the jurors' responsibilities; and
  - (g) to personalize/humanize the client and counsel to the jury.
- iv. Counsel should consider incorporating in the defense summation the promises of proof the prosecutor makes to the jury during his/her opening statement.
  - v. Counsel should be prepared to object to the prosecutor's opening statement if it is improper and to seek curative instructions or a mistrial.
  - vi. Counsel should record, and consider incorporating in the defense summation, promises of proof the prosecutor makes to the jury during his/her opening statement.

#### **F. Confronting the Prosecution's Case**

- i. Counsel should research and be fully familiar with all of the elements of each charged offense and should anticipate weaknesses in the prosecution's case.
- ii. Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems.
- iii. In preparing for cross-examination, counsel should make an effort to be familiar with the applicable law, procedures and techniques concerning cross-examination and impeachment of witnesses.
- iv. In preparing for and carrying out cross-examination, counsel should also:
  - (a) develop a coherent and sensible theory of the case, along with the framework of the closing argument;
  - (b) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;
  - (c) integrate cross-examination, the theory of the defense and closing argument;

- (d) consider whether cross-examination of each witness is necessary or likely to generate helpful information;
  - (e) review and organize all prior statements and testimony of each witness;
  - (f) be alert to inconsistencies and variations within each witness's testimony or contradictions (including material omissions) in prior statements by the witness;
  - (g) be alert to significant omissions or deficiencies in the testimony of any witness, e.g., investigative steps not taken, persons not interviewed by the police, failure to mention obvious physical characteristics;
  - (h) consider using certified copies of prior convictions or pending cases of witnesses, keeping in mind that juvenile adjudications may be used in the same manner as adult convictions;
  - (i) be alert to all issues relating to witness competency or credibility, including bias or motive for testifying;
  - (j) be alert to potential 5th Amendment issues that apply to any witness;
  - (k) elicit all facts to build and support the theory of defense.
- v. If counsel is surprised by any statements or items which should have been provided in discovery, but were not, counsel should request adequate time to review these before commencing cross-examination and should consider seeking any possible sanctions.
- vi. Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.
- vii. Unless it is clearly frivolous, counsel should file a motion and move at the close of the prosecution's case and out of the presence of any jury for a required finding of not guilty on all charges and/or any aggravating element, where appropriate. For cases that have strong legal issues to support counsel's argument, counsel should research the applicable case law and prepare, in advance, a memorandum in support of his/her motion. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

## **G. Presenting the Defense Case**

- i. Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel should consider and advise the client whether the

client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof instead.

- ii. Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify (including the likely areas of cross-examination and impeachment).
- iii. Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of production.
- iv. In preparing for presentation of a defense case, counsel should, where appropriate:
  - (a) consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;
  - (b) after discussion with the client, make the decision whether to call any witnesses;
  - (c) develop a plan for direct examination of each potential defense witness;
  - (d) determine the implications that the order of witnesses may have on the defense case;
  - (e) consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
  - (f) consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;
  - (g) consider the use of physical or demonstrative evidence and the witnesses necessary to admit it; and
  - (h) obtain the prior records of all defense witnesses.
- v. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- vi. Counsel should prepare all witnesses for all foreseeable direct and cross-examination. Counsel should also advise witnesses of suitable courtroom dress, demeanor and procedures, including sequestration.
- vii. Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.

- viii. Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.
- ix. If an objection is sustained, counsel should make appropriate efforts to rephrase the question(s) and/or make an offer of proof.
- x. Counsel should guard against improper cross-examination by the prosecutor.
- xi. Counsel should conduct re-direct examination as appropriate.
- xii. At the close of the defense case, counsel should renew any previously filed motions for a required finding of not guilty on each charged count and/or aggravating element.
- xiii. Counsel should keep a record of all exhibits identified or admitted.

#### **H. Closing Argument**

- i. Before argument, counsel must file and should seek to obtain rulings on all requests for instructions (see Mass. R. Crim. P. 24(b) and 26) in order to tailor or restrict the argument properly in compliance with the Court's rulings.
- ii. Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections and substance of closing arguments.
- iii. In developing closing argument, counsel should review the proceedings to determine what aspects can be used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:
  - (a) highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;
  - (b) favorable inferences to be drawn from the evidence;
  - (c) incorporating into the argument:
    - (1) a clear and concise theory of defense;
    - (2) helpful testimony from direct and cross-examinations;
    - (3) verbatim instructions drawn from the expected jury charge; and
    - (4) responses to anticipated prosecution arguments;

- (5) the effects of the defense argument on the prosecutor's possible rebuttal argument.
- iv. Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting (either immediately or at conclusion of argument), requesting a mistrial, or seeking cautionary instructions. Counsel should weigh strategic considerations in deciding whether to object during or after the prosecutor's closing argument.
- v. Counsel should avoid a closing which restates the Commonwealth's case. Counsel should consider incorporating in his/her summation the promises of proof the prosecutor made to the jury during his/her opening.

### **I. Jury Instructions**

- i. Counsel must file proposed or requested jury instructions before closing argument.
- ii. Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
- iii. Counsel should submit both standard and modified jury instructions tailored to the particular circumstances of the case and should provide case law in support of the proposed instructions. Counsel should consider filing proposed juvenile-specific jury instructions.
- iv. Where appropriate, counsel should object and argue against instructions proposed by the prosecution.
- v. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading the proposed instructions into the record.
- vi. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions.

- vii. After the charge, counsel should object on a timely basis to deviations and any other instructions unfavorable to the client, and, if necessary, request additional or curative instructions.
- viii. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard (outside the jury's presence) on the supplemental instruction before it is delivered.

## **J. Taking Verdicts**

Counsel should be alert to any improprieties in the verdict and consider requesting that the jury be polled.

## **8. SENTENCING**

### **A. Preparation**

Defense counsel should be familiar with and consider:

- i. the statutory penalties for each possible adjudication/conviction of the client, including each lesser- included offense and any repeat offender penalties. In particular counsel should be familiar with the sentencing provisions of G.L. c. 119 which distinguish between delinquency, youthful offender, and criminal adjudications;
- ii. the official version of the client's prior record, if any;
- iii. the position of the probation department with respect to the client;
- iv. the sentencing recommendation and memorandum, if any, of the prosecutor;
- v. seeking the assistance of an expert -- either through community resources, G.L. c. 261, §§ 27A-G, or the Committee for Public Counsel Services;
- vi. the collateral consequences attaching to any possible sentence, e.g., parole or probation revocation, immigration consequences, later exposure to prosecution as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender Registration, DNA Seizure and Dissemination, school suspension or expulsion, expulsion from public housing, lifetime community parole, or civil forfeiture of property;
- vii. the sentencing practices of the judge, to the extent they may be determined;
- viii. the sentencing guidelines, as they would apply to the case;

- ix. referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital for an evaluation in aid to sentencing under G.L. c. 123, § 15(e);
- x. Available school placements and services that could aid in disposition;
- xi. any victim impact statement to be presented to the court;
- xii. any other report to be presented to the court in aid of sentencing;
- xiii. seeking an evidentiary hearing; e.g., restitution amount;
- xiv. requesting a continuance for sentencing at a later date;
- xv. any other information or proposals that may be helpful to the client; and the DYS classification grid.

## **B. Prosecution and Probation Recommendations**

Counsel should advocate in advance of trial or sentencing for a favorable recommendation from both the prosecutor and the representative of the probation department.

## **C. Pre-Sentence Reports**

- i. Counsel should be familiar with the practices of the court and its probation department relative to pre-sentencing reports. Counsel should consider requesting one where, after consultation with the client, s/he has good reason to believe that it would be helpful.
- ii. Counsel shall determine the accuracy and completeness of all sentencing reports and statements and should be prepared to challenge any incorrect information or omissions and take steps to correct inaccuracies before prejudice occurs.
- iii. Counsel should carefully prepare the client for, and attempt to attend, any pre-sentence interview to be conducted in aid of sentencing. Counsel should advise about the client's Fifth Amendment rights, if appropriate.
- iv. Counsel should be aware that any juvenile sentenced as a youthful offender is entitled to have a pre-sentence investigation and report.

## **D. Defense Recommendations**

- i. Counsel should carefully consider and discuss with the client any sentencing recommendations to be made by the defense and the reasons for them. If appropriate, counsel should discuss any recommendations with other

experienced defense counsel. Counsel should explore all reasonable alternatives to commitment to DYS or incarceration as an adult, e.g., community services, educational services, rehabilitative programs, DCF services, including shelter care, foster placement, or residential placement, DMH or DDS services, outpatient counseling, inpatient drug treatment, and restitution.

- ii. Where tactically advisable or requested by the court, counsel should prepare a sentencing memorandum, presenting every factual and legal ground that will assist in reaching the most favorable disposition obtainable.
- iii. At sentencing, counsel should zealously advocate the best possible disposition, including a request for continuance without a finding, especially if the client has no record. Note that G.L. c. 119, § 58 permits a CWOFF even after trial for most charges. Counsel should take whatever steps are necessary, including, where appropriate, the presentation of documentary evidence and witnesses, e.g., reports or testimony from employers, community representatives, therapists/counselors, and family.
- iv. Where appropriate, counsel should carefully prepare the client or a close relative to address the court.

#### **E. Dispositions**

- i. School placement, services and performance are often essential components of dispositional advocacy. Counsel should have a detailed understanding of each client's educational circumstances and should make every effort to address school based issues prior to disposition of each case.
- ii. Counsel should be alert to, and challenge by hearing if necessary, any inappropriate conditions of probation, including the amount of restitution.
- iii. Counsel should request a reasonable time period for the payment of any fines or restitution. If appropriate, counsel should request that a hearing be held to determine the amount of restitution and should represent the client at that hearing.
- iv. Counsel should fully explain to the client, using language appropriate to the client's age and mental capabilities, the foreseeable consequences of the

sentence, including any conditions of probation and the consequences of violating probation.

- v. Counsel should fully explain to the client, using language appropriate to the client's age and mental capabilities, the DYS Classification Grid, as well as the possibility of extension of DYS commitment (G.L. c. 120, §§ 17-20). (Unless inappropriate, counsel should also advise the parent of these factors.)
- vi. Counsel should ensure that the sentence accurately reflects the rights of the client for parole eligibility and jail credit.
- vii. Counsel should consider requesting specific orders or recommendations from the court, including, but not limited to, the place or conditions of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, and recommendations against deportation.
- viii. Counsel shall ensure the youth's sentence comports with G.L. c. 119, § 58, and further counsel shall request the client's CARI to confirm that the sentence has been appropriately entered. Counsel shall continue to remain alert to errors in sentencing through the DYS Commitment process by requesting and reviewing the client's Mittimus and all other DYS-generated documents and statements regarding sentencing. Counsel shall correct any errors in the sentencing to ensure lawful sentencing. Counsel may contact YAD for support in correcting such errors.
- ix. If a DYS commitment results at disposition, counsel shall attend the case conference (also known as "staffing") which takes place after an initial evaluation period of approximately three weeks, and shall advocate for his/her client at the staffing. Counsel shall fully prepare for the staffing, including consulting with his/her client and contacting the assigned caseworker to discuss treatment and service recommendations prior to the staffing.
- x. If a DYS commitment results at disposition, *in addition* to attending and advocating for the client at the staffing (see [paragraph ix](#), above), counsel shall also attend and advocate for the client at the Regional Review Team meeting (RRT). Counsel shall fully prepare for the RRT, including consulting with his/her client, have full knowledge of the treatment and time-assignment recommendations from the staffing, and have full knowledge of the client's DYS Case History and Clinical Assessment.

- xi. Counsel should be familiar with the statutes and case law concerning jail credit. Counsel should ensure that the mittimus accurately reflects any jail credit to which the client is legally entitled. Trial counsel should be available to correct an error in the mittimus discovered at a later date.

## **9. POST-TRIAL PROCEEDINGS**

(See CPCS [Standards for Appellate Representation](#).)

### **A. Appellate Rights**

- i. Counsel shall advise the client after sentencing about the right to file a motion to revise and revoke the sentence. Counsel shall explain the value of filing the motion to enable the court to fashion an equitable disposition in future proceedings. Counsel shall file such motion in a timely fashion, pursuant to Mass. R. Crim. P. 29, if requested to do so by the client or, if appropriate to protect the client's interests.
- ii. After advising the client of the right to appeal, trial counsel shall implement the client's decision in that regard. If an appeal is taken, trial counsel shall timely file the appropriate notice of appeal and request either a tape or transcript of the prior court proceeding. If an appeal is taken, trial counsel must immediately notify the Director of Juvenile Appeals who will appoint counsel and the YAD Trial Panel Director.
- iii. Immediately upon filing the notice of appeal, counsel shall notify the Director of Juvenile Appeals of the appeal by completing a [Juvenile Appeal Referral Form](#) and emailing it to [yadappeals@publiccounsel.net](mailto:yadappeals@publiccounsel.net).
- iv. Where there is an appeal, counsel shall consider requesting a stay of execution of any sentence, particularly one of incarceration. If the stay is denied, counsel shall consider appealing the denial of the stay to a single justice of either the Appeals Court or the Supreme Judicial Court.
- v. If a state prison sentence has been imposed, counsel shall consider filing a sentencing appeal. Counsel shall represent the client at the sentencing appeal.

### **B. Continuing Duty to Represent**

- i. Trial counsel shall file a Motion to Withdraw and a Motion for Appointment of Substitute Counsel on Appeal so that appellate counsel will be appointed. Trial counsel shall assure that these motions are acted upon by the court.

- ii. Counsel retains responsibility for the case until and unless another attorney assumes that responsibility. Trial counsel shall fully cooperate with successor counsel including prompt provision of the trial file that includes all work product. Upon request of the client, trial counsel will provide a copy of said trial file.
- iii. For clients committed to DYS, trial counsel must attend and advocate for the client at the Staffing and RRT meetings, in accordance with [Section 8.e.vii](#) and [viii](#) above.

**D. PERFORMANCE STANDARDS GOVERNING  
REPRESENTATION OF JUVENILES IN DEPARTMENT OF  
YOUTH SERVICES GRANT OF CONDITIONAL LIBERTY  
REVOCATION CASES**

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## 1. GENERAL PRINCIPLES OF REPRESENTATION

### A. Panel Overview

The Revocation Advocacy Panel offers counsel at no cost to every indigent juvenile committed to the Department of Youth Services (DYS) who is returned to custody alleged violations of his or her Grant of Conditional Liberty (GCL).<sup>3</sup> The GCL is a document signed by the youth and the youth’s caseworker prior to the youth’s release from a secure DYS facility. When a youth is alleged to have violated one or more conditions of the GCL, DYS may return the youth to custody, triggering the revocation process. Revocation hearings, which must occur within seven days of the youth’s return to custody, are administrative hearings held within DYS facilities designed to preserve clients’ due process rights prior to any deprivation of liberty.

### B. Role of Revocation Attorney

Counsel’s role in juvenile revocation advocacy is to ensure that the interests and rights of the juvenile client are fully protected and advanced.<sup>4</sup> Counsel provides zealous advocacy of the client’s position regardless of counsel’s personal opinion as to the client’s culpability and/or desired outcome. Counsel helps the client

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<sup>3</sup> For revocation purposes, all DYS committed clients are presumed to be indigent. “Grant of Conditional Liberty” is defined by regulation as “A grant by the Department which results in the placement of a juvenile in a setting less restricted than that characterized by a secure facility. This includes the placement of a committed juvenile in any open community based setting (including home), the continuation of which is dependent on the juvenile’s abiding by certain predetermined rules.” 109 CMR 8.03.

<sup>4</sup> Revocation is defined as “[a] decision made after a hearing by a departmental Hearing Officer to remove a juvenile from a less restrictive setting and place him or her in a secure setting.” 109 CMR 8.03.

understand and participate in the revocation process, and gives legal counsel through every step of representation.

Counsel must know and apply relevant constitutional, regulatory, and statutory law.

Counsel must meet promptly with youth facing revocation and efficiently and thoroughly prepare all cases in which youth accepts counsel.

Counsel must know and adhere to all applicable ethical opinions and standards. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers. Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

In employing the Positive Youth Development Approach, and modeling positive adult behavior, revocation counsel must consider the unique and delicate nature of this adversarial system. Revocation clients have long-standing relationships with their DYS caseworkers that continue long after counsel's work is done. As such, zealous advocacy in this setting requires counsel to encourage a working relationship between the client and DYS. This includes working collaboratively and in a professional manner with caseworkers, district managers, and other DYS staff and administrators.

### **C. Scope of Representation**

#### **i. Duration**

Representation begins once a client accepts an attorney for the revocation process.<sup>5</sup> Representation ends at one of the following points:

- (a) If the case transfers to another revocation attorney, representation ends after counsel has fully cooperated with successor counsel in transferring the case to successor counsel, and upon request and with permission of the client, provided successor counsel with the client's entire case file, including work product.

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<sup>5</sup> If an assigned youth declines counsel upon counsel's initial visit, the case is never open for representation. For billing purposes, the case closes after the youth signs the Notice of Counsel form indicating that they are declining counsel for the revocation process.

- (b) If the case does not advance to the RRT, and neither the client nor the caseworker appeals the hearing decision, representation ends after a closing conversation with the client following the hearing.<sup>6</sup>
- (c) If after the hearing the case advances to the RRT, and neither the client nor the caseworker appeals the hearing or RRT decision, representation ends after a closing conversation following the RRT meeting.
- (d) If either the client or the caseworker decides to appeal the hearing decision, or if the client decides to appeal the decision of the RRT, the period of representation continues until the appeal decision is received and discussed with the client.
- (e) If, during the course of representation, the client determines that he or she does not want representation for the revocation process, representation ends after notifying the Revocation Advocacy Coordinator, the Hearing Officer and any other parties involved in scheduling the revocation hearings in counsel's region.
- (f) If concerns remain which are intrinsically tied to the youth's revocation disposition, or if client wishes to explore remedies beyond DYS appellate procedure, counsel shall consult with YAD Revocation Coordinator or Trial Panel Director to seek express permission to leave the case open for continued representation (see section below and [Section 5 \(c\)](#) pertaining to Post-Disposition Advocacy). This includes DYS requests for "Commissioners' Privilege".

## ii. Collateral Representation

If counsel wishes to represent the client on a matter which otherwise would be collateral but which counsel believes is integral to the legal outcome of the revocation case, counsel should seek the approval of the Revocation Advocacy Coordinator or the Trial Panel Director. Such requests should be made in writing to the Revocation Advocacy Coordinator or the Trial Panel Director. The specific circumstances of the original assignment and the nature of the collateral matters should be briefly described in the written request. If counsel's request to provide representation is approved by the Revocation Advocacy Coordinator or the Trial Panel Director, counsel may then provide services, but

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<sup>6</sup> If a hearing occurs and a disposition of "continued" is entered by the Hearing Officer, the case will remain open for the duration of the revocation proceedings, which will include an additional hearing or hearings.

he or she may not receive compensation from the client or any source other than CPCS for representation on the related case.

**D. DYS Policy Regarding Access to Counsel During Revocation Process**

Counsel shall be familiar with the Department of Youth Services Official Policy #02.10.01: Access to Counsel in DYS Revocation Proceedings, or the most recent relevant DYS Official Policy.

**E. Adherence to Relevant Case Law, Statutes, Regulations, and Policies**

Counsel shall have an understanding relevant legal authority including related Due Process case law, case law and research regarding adolescent brain development, applicable administrative hearing rules 801 CMR 1.00, DYS regulations 109 CMR 8.00-8.14, and current DYS policies.<sup>7</sup> Counsel shall utilize and adhere to legal authority in keeping with the youth's stated legal interest.

**F. Determining and Advocating the Child Client's Position**

In representing the revocation client, counsel shall utilize his or her knowledge of the Positive Youth Development Approach to zealous advocacy. Counsel shall, in a developmentally appropriate manner, elicit the client's preferences, advise the client, and provide guidance.

Counsel has a duty to explain to the client in a developmentally appropriate way such information as will assist the client in having maximum input in determining his or her position. Counsel must fully explain the nature and purpose of the revocation procedures, as well as all of the client's rights and defenses. Counsel must be adept at asking developmentally appropriate questions and interpreting the client's responses in such a manner as to obtain a clear understanding of the client's preferences. This requires counsel to use language appropriate to the client's culture, age and mental capabilities. Where counsel has significant questions

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<sup>7</sup> DYS policies are available online at <http://www.mass.gov/eohhs/gov/laws-regs/dys/policies>.

regarding the client's competency to participate in the revocation process, counsel should contact the Revocation Advocacy Coordinator or Trial Panel Director.<sup>8</sup>

In eliciting the client's preferences, counsel should be aware of and understand the factors that influence the client's decision-making process.

Counsel should review records and, with the client's written permission, consult with any relevant collaterals with knowledge of the client.

Counsel shall advise the client of the potential consequences of particular positions. Counsel may express an opinion concerning the likelihood of the hearing officer or other parties accepting particular positions. Counsel should recognize that the juvenile client may be more susceptible to the attorney's influence than some adult clients, and should ensure the youth's expressed preferences reflect the youth's actual position. Counsel shall counsel the client, present him or her with comprehensible choices, help the client reach his or her own decisions and advocate the client's viewpoint and wishes to DYS and the Hearing Officer.

#### **G. General Duties of Revocation Counsel**

Counsel's primary and most fundamental responsibility is to promote and protect the interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case.

- i. Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford zealous representation of a client in a particular matter before agreeing to act as counsel or accepting an assignment. In light of the short duration of representation and the small amount of time between assignment of a client and the hearing date, counsel must make him/herself available as needed (this includes weekends and evening hours). Although highly unlikely, counsel must be prepared to accept collect calls from clients. It is recommended that counsel anticipate that juvenile clients will require more contact than the average adult client.

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<sup>8</sup> In addition, counsel should alert the Trial Panel Director or Revocation Advocacy Coordinator when any such questions of competency might call to question the client's original underlying delinquency adjudication.

- ii. Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client, which includes all documents and materials related to the case. Counsel must include a printed copy of all written revocation hearing decisions from counsel’s representation in the client’s file. As part of this file, counsel must maintain a “running sheet” or log which records information obtained during the course of representation, such as all client contacts; contacts with witnesses, family members, friends, and employers; the client’s background and history; hearing dates and important events; contact with investigators and results of investigations; conversations with the DYS caseworker; conversations with the hearing officer; conversations with police officers, probation officers, and other attorneys; conversations, consultation and evaluation by experts; conversations with other collaterals in regards to the client; and legal research conducted in furtherance of the case.<sup>9</sup> In addition, the file must also include all relevant documents and work product related to representation.
- iii. *Conflicts of Interest.* Counsel must be alert to and avoid all potential and actual conflicts of interest that would impair counsel’s ability to represent a client—particularly when appointed to represent multiple clients. The presence of a conflict may require counsel to withdraw from representing one, some, or all of the clients, and transfer the case to another revocation-certified attorney. In such an event, counsel shall notify the Revocation Advocacy Coordinator as described in [Section 2\(h\)](#), Procedures for Declining an Assignment.
- iv. Counsel shall explain to the client those decisions that ultimately must be made by the client, and the advantages and disadvantages inherent in these choices. These decisions include whether to waive a GCL revocation hearing; whether to stipulate to or contest the alleged GCL violations; whether to stipulate to or contest the DYS Region’s recommendation for disposition and, if contesting the DYS Region’s recommendation, what disposition to request; whether to testify at the hearing; and whether to appeal.
- v. Counsel should explain that final decisions concerning hearing strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding which witnesses

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<sup>9</sup> A sample running sheet is provided to attorneys.

to call, what questions to ask, and what evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is the counsel's consideration of the client's input and full disclosure to the client of the factors considered by counsel in making the decisions. Counsel should advise the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters.

- vi. Counsel's obligation to the client ceases if another revocation attorney is assigned to counsel's case prior to the end of the case. Transfer is complete once counsel has provided successor counsel with necessary information and documentation, with permission of the client.
- vii. Counsel shall protect the client's right to have a hearing within seven days of returning to custody, unless the client agrees that a delay is necessary for zealous advocacy.
- viii. Counsel, conversely, shall request a delay to allow adequate time to prepare, when such delay is authorized by the client and is necessary in order to protect the client's due process right to meaningfully advocate for his or her legal interests.
- ix. Where counsel is unable to communicate with the client and/or his or her guardian because of language differences, counsel shall take whatever steps are necessary to ensure that he or she is able to communicate with the client and that the client is able to communicate his or her understanding of and position in the revocation process.
- x. Counsel must be alert to competency concerns when working with a client whom counsel believes is unable to participate in the development of his or her own case. Where counsel has significant questions regarding the client's competency to participate in the revocation process, counsel shall contact the Revocation Advocacy Coordinator or the Trial Panel Director. In addition, where the client's competency has been called into question by information provided to counsel, counsel shall consider the underlying question of whether the client was competent to stand trial for the original committing offense, and counsel shall discuss with the Revocation Advocacy Coordinator or the Trial Panel Director the process of referring the case to the Youth Advocacy Division's Director of Juvenile Appeals.

- xi. Counsel shall be prompt for all DYS appearances and appointments and, if a delay is unavoidable, shall take necessary steps to inform the client and DYS, and minimize inconvenience to others.
- xii. Counsel shall sign in and out of all DYS facilities when visiting detained clients and for all other DYS appearances, using the CPCS logbooks located in each DYS facility.

## **H. Protection of Confidentiality, Privilege, and Attorney Work Product**

Consistent with the client's interests and goals, counsel shall seek to protect from disclosure communications and other information concerning the client that are protected by applicable laws of confidentiality and privilege, including attorney work product. Counsel shall not discuss any attorney-client privileged communication with the parent/guardian, or any other person, without the express permission of the client. Counsel shall explain fully to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality.

Prior to accepting any clients, counsel agrees to maintain the confidentiality of all materials, correspondence and communication that are provided to counsel. Counsel agrees not to share written or electronic confidential DYS information, or information which could identify DYS youth with anyone outside of DYS, the Youth Advocacy Division, or any other party not covered by the attorney/client privilege without the permission of the client. Counsel further agrees to safeguard verbal, written or electronic DYS information related to DYS youth. Counsel will ensure that confidential information regarding DYS youth contained in or transmitted via mobile electronic devices is safeguarded by password protecting those devices and not leaving them unattended. In the event that counsel is responsible for a breach of confidentiality, Counsel will report said breach immediately to his or her client, take remedial action and notify the Revocation Advocacy Coordinator.

## **2. ASSIGNMENT OF COUNSEL**

- A.** The GCL Revocation duty calendar, comprised of seven day duty weeks including weekends and holidays, is created by YAD in consultation with panel attorneys. Prompt response to requests for scheduling availability is imperative to the on-going functionality of the panel.

- B.** By 10 AM of every business day (Monday – Friday), the Revocation Advocacy Coordinator and attorneys on the Revocation Advocacy Panel in each region will receive an e-mail from DYS notifying the Panel of any youth in the applicable region brought into DYS custody for the revocation process within the previous 24 hours. This e-mail will include attached Notice of Counsel forms for any such youth for the attorney on duty to print and fill out with the client during the initial visit.<sup>10</sup> Counsel should make every effort to visit the client within the same day that notice is received. However, counsel must see the client no later than 24 hours after receiving notice.
- C.** On weekends and holidays, the attorney on duty shall call each DYS revocation unit within counsel’s assigned region at 10 AM each day and ask the shift supervisor for the name of any youth brought into custody for revocation within the previous 24 hours. Additionally, counsel shall confirm that any newly-arrived youth are from within the region. If any newly-arrived youth are from out-of-region, counsel will contact the revocation attorney on duty from that respective region in order to notify him or her of those youth and determine who will cover the case. For weekend duty, counsel must see clients by Sunday evening.<sup>11</sup> If the Monday following weekend duty is a state or federal holiday, counsel must see any weekend clients by Monday evening. For weekend and holiday duty, it is counsel’s responsibility to bring blank Notice of Counsel forms to fill out with the client(s).
- D.** Upon conclusion of the initial visit, counsel must locate staff on the unit to make a copy of the Notice of Counsel form for counsel to keep, and provide staff with the original.
- E.** It is advised that the attorney on duty call and notify the respective units prior to visiting the client.

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<sup>10</sup> Each youth returning to custody must sign the Notice of Counsel form in the presence of counsel. The Notice of Counsel form documents whether or not the youth wishes to retain counsel for revocation purposes.

<sup>11</sup> It is expected that the attorney will still call the units on both Saturday and Sunday morning. This is so that the attorney can plan visits accordingly and visit on Saturday, if needed, in situations where a high number of youth are returned to custody.

- F.** The attorney on duty must accept every assignment of a new youth brought into custody for the revocation process.

*Commentary:* This section does not preclude attorneys from working together to exchange duty days or weeks, or from covering each other's duty obligations. However, whenever counsel initiates a duty schedule change, counsel on duty should notify the coordinator and ensure that the change is reflected on the online calendar.

- G.** Counsel shall only decline the assignment in the following situations:

- i. counsel is unable, due to exigent circumstances, to provide the youth prompt, diligent representation; or
- ii. acceptance of the assignment will create a conflict or potential conflict of interest.

*Commentary:* Counsel cannot provide prompt, diligent representation of a youth if counsel is unable to begin working on the case within 24 hours of receiving notice of the youth (or by Sunday evening for weekend duty, or Monday evening for weekend duty that includes a state or federal holiday).

*Commentary:* It is counsel's responsibility to be aware of the caseload limits of the Committee for Public Counsel Services ("CPCS") found in the CPCS Manual for Assigned Counsel. Counsel should not accept any assignment that will cause him or her to exceed these limits.

- H.** Procedure for Declining an Assignment:

As soon as counsel realizes he or she must decline an assignment, counsel must promptly notify the Revocation Advocacy Coordinator. In the interest of expediency, assistance from counsel in securing case coverage, when possible, is encouraged.

### **3. HEARING PREPARATION**

Counsel shall be familiar with the Granting and Revocation of Conditional Liberty for Juveniles Committed to the Department of Youth Services Regulations (109 CMR 8.01-8.14), the most recent version of the Department of Youth Services Official Policy on the Violation of Conditional Liberty (Policy # 1.3.6(a)); Massachusetts Informal

Fair Hearing Rules (801 CMR 1.00); relevant due process case law; as well as the most recent version of the Department of Youth Services Caseworker Manual.

*Commentary:* It is counsel's obligation to remain alert to any changes of official DYS policy, and ensure he or she is using the most recent copy of any DYS policy.

**A. Initial Interview**

Counsel shall:

- i. make every effort to conduct an initial interview in person with his or her assigned youth the same day that notice is received. However, counsel must interview the client within 24 hours of receiving notice of the youth's arrival in DYS custody;
  - ii. explain, using language appropriate to the client's culture, age, and mental capabilities, the revocation hearing process, the availability of legal representation, the role of counsel, and the rules of confidentiality;
  - iii. discuss waiver, if appropriate (see [subsection b\(i\)](#) below);
  - iv. determine whether the youth accepts or declines legal representation and obtain the youth's informed signature on the Notice of Counsel form;
- and

**B. Submit the Notice of Counsel Form to the Clinician on Duty at the DYS Revocation Unit, and Obtain a Copy to Keep for Counsel's Own Files.**

*Commentary:* If there is no clinician on duty at the time, counsel shall either deliver the Notice of Counsel form to a predetermined place on the unit ensuring that the clinical staff will deliver it to the appropriate DYS administrator, or, if no such place exists, counsel shall fax the form to the appropriate DYS administrator given the responsibility to collect signed Notices of Counsel.

- i. Waiver of Revocation Hearings:

A client facing a 1-7 disposition may choose to waive his or her hearing. Waiving the hearing means that the client is forfeiting the opportunity to defend him/herself from the allegations. While in the past, clients would sign waivers with DYS caseworkers, this practice must now occur between client and attorney and is invalid if facilitated by the caseworker. During the initial interview of any youth facing a 1-7 day disposition, counsel shall inform the client about his or her option to waive the revocation hearing using language

appropriate to the client's culture, age, and mental capabilities, and taking into consideration his or her circumstances at the time. Counsel shall ensure that the youth is fully informed and making an adequately considered decision before signing a waiver of his or her revocation hearing. Counsel shall make sure the client understands that, if the client chooses to waive, he or she may at a later time contact counsel and proceed with a hearing with representation if circumstances should change.

### **C. Interview Upon Acceptance of Representation**

If the client accepts legal representation, counsel shall:

- i. Conduct a thorough interview of the client, using language appropriate to the client's culture, age, and mental capabilities, to obtain information relevant to the revocation process. The information collected should include, but is not limited to:
  - (a) the facts and circumstances surrounding the alleged violations, the client's return to custody, and the disposition the caseworker is seeking, if the client knows;
  - (b) the client's date of birth;
  - (c) residence and whether client can return to that residence upon release;
  - (d) primary language;
  - (e) race and ethnicity;
  - (f) contact information (home phone number, cell phone number);
  - (g) guardian (name, phone number, address);
  - (h) date client arrived in custody, and, if different, client's first date in DYS custody for the revocation process;
  - (i) DYS caseworker and region;
  - (j) date of commitment and committing charges;
  - (k) pending court cases, including upcoming court dates, the court in which the charges will be addressed, the name of the client's attorney for any pending case, and the new charges;
  - (l) DYS placement history;
  - (m) educational history including school enrollment, grade level, SPED services, and any pending disciplinary hearings;
  - (n) employment history;
  - (o) involvement in the community including any important adult figures;
  - (p) involvement or interest in any extracurricular activities;

- (q) involvement with other agencies, such as the Department of Children and Families, the Department of Mental Health, the Department of Developmental Services, or the Children's Behavioral Health Initiative;
  - (r) medical and mental health history;
  - (s) current or past medications; and
  - (t) substance abuse concerns and any substance abuse treatment history.<sup>12</sup>
- ii. Inform client that counsel will be requesting client's Criminal Offender Record Information from CPCS.
  - iii. Ask the youth for the names of his or her current or recent attorneys (such as revocation, CAFL, delinquency, or criminal) and request permission to contact them.
  - iv. When needed, obtain signed release by the client and the guardian for mental health records, school records, DCF records, employment records, etc. Counsel shall, using language appropriate to the client's culture, age, and mental capabilities, advise the client of the potential use of this information and the privileges that protect this information.
  - v. Ensure the client has counsel's card with counsel's name and phone number, and that the counsel's name and phone number is added to the client's call list on the DYS unit. Counsel must accept collect calls from the client.

#### **D. Further Client Interaction and Involvement**

Counsel Shall:

- i. Conduct adequate investigation and discovery as discussed further below;
- ii. Review the information gathered from investigation and discovery, including the revocation packet, with the client;
- iii. Advise the client, using language appropriate to the client's culture, age, and mental capabilities, as to whether to admit or deny culpability and fully explain all available dispositions and the consequences that follow from deciding to pursue any avenue of argument;
- iv. Determine the client's position regarding his or her culpability for the alleged violations and his or her desired disposition;

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<sup>12</sup> A sample opening booklet that incorporates these requirements is provided to attorneys.

- v. Advise the client, using language appropriate to the client's culture, age, and mental capabilities, as to the likelihood of success based on the client's position with respect to culpability and disposition;
- vi. Develop a strategy for preparing for and conducting the hearing in accordance with the client's positions with respect to culpability and disposition;
- vii. Ensure the client is afforded his or her right to a hearing within 7 days of being placed in DYS custody for the revocation process, unless delay is necessary for zealous advocacy, and the client agrees to request it.

*Commentary:* Where counsel believes that the client's desires are not in the client's best interest, counsel may attempt to persuade, but not pressure, the client to change his or her position. If the client's opinion remains unchanged, however, counsel must assure the client that counsel will defend the client's position vigorously.

#### **E. Investigation and Discovery**

- i. Counsel shall promptly investigate the circumstances of the allegations against the client and explore all avenues leading to facts relevant both to the client's culpability and the disposition. The investigation should include efforts to secure information in the possession of DYS, as well as from witnesses and collaterals identified by the client or others.
- ii. Counsel shall request the client's Criminal Offender Record Information ("CORI") through CPCS's CORI Department in order to a) remain informed of and alert to previous and on-going matters; and b) confirm the legality and accuracy of the youth's committing sentence. Upon discovery of an error in sentencing, counsel shall advocate to correct the error. Counsel shall contact YAD upon any need for advice regarding CORI interpretation or sentence legality. Counsel shall follow all regulations and ethical rules in regards to safeguarding the client's CORI.
- iii. If the youth has any open juvenile or criminal matters, counsel shall promptly contact the youth's attorney(s) on these underlying charges, with permission of client.
- iv. Counsel shall meet with the client and obtain from the client information relevant to the hearing and the client's position. Counsel shall keep the client informed of updates in counsel's investigation and discovery, and continue to

assess the client's position with respect to culpability and disposition in relation to such information.

- v. Counsel must contact the caseworker to gather as much information as possible about the client, the alleged violations, and the caseworker's recommended disposition.
- vi. Investigation and preparation shall follow a Positive Youth Development framework, including an assessment of the youth's level of engagement in DYS and community, vocational, and therapeutic services, as well as the availability of community referrals and resources that may bolster the youth's opportunities to thrive and remain in the community.
- vii. The revocation packet is central to the effective representation of the client. According to DYS revocation protocol, DYS must send counsel a revocation packet within 2 business days of the client's return to custody for the revocation process. Counsel should be aware of this time allowance, and advocate for adherence where he or she finds it necessary.
- viii. The revocation packet should contain:
  - (a) a Revocation Packet Checklist;
  - (b) the Conditional Liberty Violations Report ("CLVR");
  - (c) the Grant of Conditional Liberty ("GCL");
  - (d) the Case History;
  - (e) the most recent program Discharge Summary;
  - (f) the Service Delivery Plan;
  - (g) a copy of the Placement History from the DYS Case Management system; and
  - (h) any other evidence that the caseworkers plans to use against the youth.
- ix. Where it is in the client's legal interest, counsel shall formally request additional discovery from DYS not included in the revocation packet, such as: Community Services Treatment Plan ("CSTP"), Relapse Prevention Plan ("RTP"), case notes, prior hearing decisions, Individualized Education Plan ("IEP"), and any other relevant information.
- x. Counsel shall remain alert to, and request documentation regarding, incident reports pertaining to the youth's behavior while on the unit. Counsel shall obtain as much information as possible regarding the incident, including whether or not there is a possibility of juvenile or criminal charges resulting

from the incident. Counsel shall also ask to view any videotape of the alleged incident prior to its consideration.

xi. Witnesses and collaterals

Consistent with the client's interests and goals, and after obtaining permission from the client, counsel shall identify and contact family, friends, and collaterals who are potential witnesses, or who may provide background information, evidence, or support for the client's position. This includes the client's committing attorney and attorneys working with the client on any pending matters.

**F. Communication with DYS and Introduction of Evidence**

- i. Communication with DYS caseworkers is essential to ensuring that counsel is able to present a fully-informed defense for the client, and adequately prepared to advise the client with respect to the client's decision to admit or deny culpability and to choose a disposition to argue for at the hearing.
- ii. No later than 1 day prior to the revocation hearing, counsel shall inform the DYS caseworker regarding any witnesses or additional discovery (beyond the revocation packet) he or she intends to present as evidence at the revocation hearing, and provide the caseworker with a copy of any such discovery.
- iii. No later than 1 day prior to the revocation hearing, DYS is also required to inform counsel of any additional discovery that the caseworker intends to present as evidence at the revocation hearing, and provide counsel with a copy of any such discovery. Counsel should be aware of this procedural requirement and contest the presentation of any evidence that was not produced to counsel with 24 hours' notice if consistent with counsel's strategy and the client's wishes.

**G. Defense Preparation**

Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel shall:

- i. Investigate and be fully familiar with each alleged violation listed in the CLVR, and should identify weaknesses in the DYS Caseworker's case to refute an alleged violation or alleged violations of the client's GCL as well as the Caseworker's disposition request.

- ii. Prepare any witnesses for all foreseeable questioning by counsel, DYS Caseworker, Hearing Officer, or other DYS administrators.
- iii. Take all necessary and appropriate steps to ensure the availability and presentation of evidence at the hearing.

#### **H. Participation of Client**

- i. The client retains the authority to decide whether or not to testify at the hearing. Counsel should advise the client with respect to the actual and potential consequences of testifying. When appropriate, counsel shall work with youth to assist youth in preparing an oral or written statement in support of his or her case.
- ii. The hearing officer may direct questions at the client. Counsel shall prepare client for this likelihood and advise regarding the substance and merit of client participation. In addition, counsel shall advise youth regarding appropriate comportment during the hearing. If the client has decided not to testify, counsel should so inform the hearing officer. If the client has decided not to testify, counsel should so inform the hearing officer.
- iii. Particularly where the youth has been revoked for a new arrest, has an open criminal or juvenile case, may be facing a probation surrender, or may be facing a forthcoming criminal or juvenile charge, counsel must remain vigilant as to the youth's risk of self-incrimination as well as the possible consequences of contesting or not contesting the allegations and/or the disposition. Counsel must advise the client on these matters so that the client understands the risks and may provide a fully informed decision as to whether to contest and how to participate. If not fully confident regarding the potential consequences, counsel shall seek advice from the Youth Advocacy Division or other qualified delinquency or criminal law practitioners.

#### **I. Participation of Family and Collaterals**

- i. Consistent with the client's interests and goals and with the client's permission, counsel may invite the client's family and/or other collaterals to participate in the revocation hearing. Counsel shall take such steps as may be necessary to offer the testimony and/or arrange the presence of such persons. If the presence or participation of a witness is not allowed, counsel shall object

and note this for the record and, when in the client's interest, raise the issue on administrative appeal. If the person is unable to attend, and counsel deems it advantageous to the client's legal interest, counsel can initiate a call to the non-attending support witness via a conference call or speaker phone.

- ii. Counsel should be aware that even if the client does not wish a particular person to be present or to testify at the revocation hearing, the DYS caseworker may present that person as a witness at the hearing.

#### **4. CONDUCT OF HEARING**

Counsel shall be familiar with the Code of Massachusetts Regulations Standard Adjudicatory Rules of Practice and Procedure (801 CMR 1.00).

*Commentary:* According to 109 CMR 8.10 Procedures at Revocation Hearing, “[t]he hearing shall be conducted subject to the Standard Adjudication Rules of Practice and Procedure (801 CMR 1.00).” Counsel should familiarize him/herself to the particular hearing practices and procedures of the DYS region in which he or she is providing representation. Counsel should consider, in the appropriate case, whether to challenge the lack of utilization of the Standard Adjudication Rules of Practice and Procedure.

During the hearing, counsel shall act as a zealous advocate. To the extent consistent with the client's interests and goals as determined pursuant to these Performance Standards, counsel shall, at the revocation hearing, 1) make any and all offers of proof; and 2) present witnesses and evidence favorable to the client's position.

##### **A. Alleged Violations**

- i. Counsel should carefully consider the advantages and disadvantages of stipulating to any alleged violations and have fully explained and gained client's desire to stipulate, before stipulating to any violations at the hearing.
- ii. If counsel is surprised by any evidence that should have been, but was not, provided to counsel prior to 24 hours before the hearing, counsel shall challenge the presentation of such evidence at the hearing, where doing so is in furtherance of the client's stated interest. Counsel should consult with the client before agreeing to the presentation of such evidence at the hearing. Counsel may ask the hearing officer to permit counsel and the client to step outside the room in order to have this conversation privately.

## **B. Disposition**

- i. Counsel shall zealously and thoroughly advocate for the client's desired disposition, by providing reasons and mitigating factors in support thereof.
- ii. Counsel shall include information about any community based alternatives for the Region's treatment goals for the youth.
- iii. Counsel's personal opinion about the reasonableness of the required disposition should not detract from counsel's zealousness in pursuing the disposition.
- iv. Although placement cannot be determined at a revocation hearing, when placement is at issue zealous advocacy will require that counsel consider, investigate, and advocate for alternative placements if consistent with the client's desires.

## **C. Additional Matters**

- i. Counsel shall note on the record any procedural or fairness concerns so long as doing so is pursuant to client's stated legal interest.
- ii. Since at this time DYS does not comply with its own regulations in regards to recording all hearings, counsel shall keep notes of, or make a recording of, the proceedings.
- iii. If the disposition of the hearing is "escalation to the RRT" counsel shall follow up with the DYS Caseworker to determine the date and time of the RRT.
- iv. Counsel shall meet with the youth after the hearing to ensure that the youth has understood what occurred during the proceeding.

## **5. POST-HEARING REPRESENTATION**

### **A. Appeal**

- i. Both before and after the revocation hearing, counsel shall advise the client, using language appropriate to the client's culture, age, and mental capabilities, that he or she has the right to appeal the hearing officer's

decision. Counsel shall also explain the appellate process and timelines attendant to that process.

- ii. Counsel shall inform the client, using language appropriate to the client's culture, age, and mental capabilities, that the client has the right to submit his or her own written appeal, or to have counsel write one on the client's behalf:
  - (a) If the client desires to submit the appeal on his or her own, without representation, counsel shall advise the client that the appeal must be submitted within 7 seven days of the revocation hearing.
  - (b) If the client desires the aid of counsel, counsel shall either assist the client in writing and submitting an appeal him/herself, write and submit an appeal on the behalf of the client, or both, within 7 days of the revocation hearing to the DYS Director of Community Operations (c/o Department of Youth Services, 600 Washington Street, 4th Floor Boston, MA 02111). For attorney submissions, scanned and emailed versions are preferable.
  - (c) Upon submission of an appeal, counsel shall forward the appeal to client's DYS caseworker.
- iii. For the purposes of appeal, counsel shall remain current with applicable due process case law and, where appropriate and concurrent with client's interest, shall advance all pertinent arguments as to procedural inadequacies.
- iv. In the event that the DYS caseworker appeals the Hearing Officer's decision, counsel shall ensure that he or she and the client receive a copy of the appeal that was filed with DYS, and, in accordance with the client's desires, shall assist the client in writing and submitting a response, write and submit a response on behalf of the client, or both, within 3 days of the receipt of such an appeal.
- v. According to DYS revocation protocol, the DYS General Counsel's Office must send a written decision to the client or counsel within 14 days of receipt of the appeal. Upon receipt of an appeal decision, counsel shall inform the client of the outcome.

## **B. Regional Review Team (RRT)**

- i. If at the hearing, the client receives a 90-120 day or an "escalated" disposition, counsel shall ask the caseworker whether there will be an RRT meeting and when and where it will be held. If client's case will be presented at RRT,

counsel shall inquire of the client whether he or she would like counsel to represent him or her at that meeting.

- ii. Counsel should, where appropriate, request from the caseworker and/or DYS Legal Department any evidence that the RRT will be using to make its decision.
- iii. Prior to the RRT, counsel shall: investigate placement and treatment options; advise the youth as to these options; ascertain the youth's stated interest; and prepare thoroughly so as to zealously advance that interest at the RRT.
- iv. Zealous advocacy at the RRT may require counsel to consider alternative residential or community-based treatment options for the youth; as such counsel should maintain a working knowledge of local social services and placement options as well as the ability to research such options.

### **C. Post-disposition Matters**

- i. Revocation cases will generally close after an attorney/client conversation following the revocation hearing decision, appeal decision, and/or RRT decision. However, at times, after the point at which a case would close, revocation counsel will be alerted to a change in circumstance that has affected the release date of the youth that had been reached via the revocation proceeding. In these instances, counsel shall contact the Revocation Advocacy Coordinator or the Trial Panel Director to determine whether CPCS may authorize continued advocacy.

*Commentary:* changes in circumstances may include caseworkers' requests for "Commissioners' Privilege", or other situations which lead DYS to request an extension of the youth's time in custody, via an RRT meeting. In addition, an attorney may learn of a youth who is not revocation-eligible but has been deprived of liberty without access to due process. In both cases, the attorney shall contact YAD to report the case and determine whether YAD can provide the youth with access to counsel.

### **D. Continuity of Representation**

- i. It is preferable for the same revocation attorney to represent the same youth each time the youth returns to custody to face revocation. In the interest of decreasing duplication of services and providing more knowledgeable and

therefore more zealous representation to revocation youth, counsel shall aspire to provide continuity of representation to his or her former clients whenever possible.

## **E. PERFORMANCE STANDARDS GOVERNING JUVENILE PAROLE REPRESENTATION**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in the Assigned Counsel Manual and other CPCS publications, including those published on the CPCS website. See [www.publiccounsel.net](http://www.publiccounsel.net).

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## 1. GENERAL PRINCIPLES OF REPRESENTATION

### A. Role of Defense Counsel

On March 23, 2015, the Supreme Judicial Court held that “parole eligibility is an essential component of a constitutional sentence under article 26 for a juvenile homicide offender subject to mandatory life in prison.” *Diatchenko v. District Attorney for the Suffolk Dist.*, 471 Mass. 12 (2105) (hereinafter referred to as *Diatchenko (II)*). Historically, there is no constitutionally protected liberty interest in a grant of parole. *See Greenholtz v. Neb.*, 442 U.S. 1, 7 (1979). However, in the context of juvenile lifers, the Supreme Judicial Court determined that a meaningful opportunity for release through parole is necessary to conform the juvenile offender’s mandatory life sentence to constitutional requirements under article 26. Accordingly, the Court determined, for this cohort, that the parole process takes on constitutional dimensions that do not exist for other offenders. Thus, the Court required the appointment of counsel for parole hearings, access to funds for expert witnesses, and the availability of limited judicial review of decisions denying parole release.

The purpose of this Parole Panel is to ensure that each juvenile homicide offender is afforded “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Diatchenko II*.

Counsel shall be assigned one year prior to parole eligibility.

Counsel's role in the parole system is to ensure that the interests and rights of the client are fully protected and advanced. Counsel must be familiar with and know how to apply the federal and state case law concerning parole and adolescent development and culpability, know and adhere to all applicable ethical opinions and standards and comply with the rules of administrative hearings and the court. Where appropriate, Counsel may consider a legal challenge to inappropriate rules and/or opinions. If in doubt about ethical issues in a case, Counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers.

Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

The role of Counsel in parole cases is to be an advocate for parole release as directed by the client. Counsel should ensure that the interests and rights of the client are fully protected and advanced, irrespective of Counsel's opinion of the client's appropriateness for release. This requires fully explaining to the client the nature and purpose of the proceedings, using language that is appropriate to the client's age and mental capabilities, and the general consequences of the proceedings.

## **B. Education, Training and Experience of Defense Counsel**

To provide competent representation, Counsel must be familiar with Massachusetts criminal law and procedure and rules of administrative procedure, including changes and developments in the law. It is Counsel's obligation to remain current with changes in the statutory and decisional law. Counsel must also have a strong understanding of the parole board, adolescent brain development, including both scientific studies and relevant case law. Counsel should participate in training and education programs in order to maintain and enhance advocacy skills.

To provide competent representation in parole cases, Counsel must be thoroughly familiar with the law, practices of parole hearings, and clients' appeal rights including M.G.L. c. 27 § 4, § 5; M.G.L. c. 127 § 130, § 130A, § 131, § 131A, § 133, § 133A, § 133C, § 133D1/2, § 134, § 135, § 136, § 158, § 166, and § 167; and, M.G.L. c. 249, § 4; the Code of Massachusetts Regulations 120 C.M.R. 300.04-08(1); 120 C.M.R. 301.04, 301.06, 301.08-09; 120 C.M.R. 304.00 et al.; 120 CMR 401.04; and, 120 C.M.R. 500 et al. Counsel also must be thoroughly familiar with the Parole Board's Guidelines for Life Sentence Decisions, published on the Board's website.

Counsel must attend at least one juvenile lifer parole release hearing at the Massachusetts Parole Board at 12 Mercer Road, Natick, MA prior to representing a client at a lifer parole release hearing.

Counsel who have not handled a substantial number of cases, will be required to consult regularly with an assigned Parole Mentor and/or with the YAD Administrative office regarding the preparation of the case.

### **C. General Duties of Defense Counsel**

The role of Counsel is to ensure that the client eligible for parole release is afforded due process and that his/her argument for parole release is presented in as persuasive a manner as possible. Counsel should assert all rights and raise all issues in the context of the case where strategically appropriate.

Counsel's primary and most fundamental responsibility is to promote and protect the interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case. If personal reactions make it impossible for Counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client. In such cases, Counsel shall immediately notify the YAD Administrative office of the situation.

Parole representation involves substantial client preparation. In order to properly prepare the client's case and to apprise the client of the progress of the case throughout its duration, Counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. In accepting appointment on a juvenile lifer parole release hearing, Counsel must understand that s/he is making a commitment to spend a substantial amount of time at a state prison during the course of a year and an even more concentrated amount of time at the prison during the month of the hearing.

Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting an appointment. Counsel must maintain an appropriate, professional office in which to consult with witnesses and must maintain a system for receiving regular collect telephone calls from incarcerated clients. Counsel must provide incarcerated clients with directions on how to contact the office via collect telephone calls (e.g., what days and/or hours that collect calls will be accepted). Counsel must anticipate that, due to the nature of parole proceedings, clients facing parole will require more contact than the average adult client. In order to advise the client about decisions to assert or waive rights, to prepare the client to testify at any hearing, and to apprise the client of the progress of the case, Counsel must meet with the client as needed and at reasonable intervals at the client's place of confinement throughout the pendency of the case, and until the representation has concluded. Visitation at "reasonable intervals" with clients facing initial parole release hearings typically requires at least monthly meetings of at least three hours during the year leading up to the hearing and at least

weekly visits of three hours during the month of the hearing. Some clients may require more meeting time than this.

Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client. As part of this obligation Counsel should maintain files on: all interviews of the client; interviews of witnesses, interviews of family members, friends and employers; interviews with trial counsel and appellate counsel; the investigation and review of records concerning the client's background and history, including juvenile court records, Department of Youth Services records, Department of Children and Family records, medical records and school records.

Counsel should maintain files on contact with social workers, investigators and expert witnesses and the results of their investigations. Conversations with Department of Correction officials regarding review of and production of DOC records should be included in the client's file. Conversations with parole officials, including the client's Case Manager and Institutional Parole Officer should be recorded in the file.

Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner.

Counsel shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions include whether Counsel or the client will make the opening statement and closing argument, or whether Counsel and the client will share in the presentation of both; whether the client will agree or disagree with some or all of the Commonwealth's version of the crime; whether the client will admit or deny allegations of prison misconduct as recorded in prison disciplinary reports and incident reports; which persons will be called as the client's support witnesses and the general content of the witnesses' testimony; the components of the client's re-entry plan, and whether to appeal an adverse parole decision.

Counsel's obligation to the client continues on all matters unless and until another attorney is assigned and/or files an appearance. Counsel shall fully cooperate with successor counsel and must, upon request, promptly provide successor counsel with the client's entire case file, including work product.

Where Counsel is unable to communicate with the client because of language differences, the attorney shall take whatever steps are necessary to ensure that

he/she is able to communicate with the client and that the client is able to communicate his/her understanding of the proceedings. Such steps would include obtaining funds for an interpreter.

Counsel shall carefully consider whether a social worker, a sentencing expert, an expert psychologist or psychiatrist, an investigator or other expert would be helpful in the preparation and presentation of the client's case. If so, Counsel shall file a motion for funds for an expert. See *Diatchenko II*.

Counsel shall consider all steps necessary to investigation and research in advance of scheduling the hearing, such that counsel is confident that the most viable parole theory has been fully developed, pursued, and refined. The required preparation is set forth below.

## **2. PREPARATION FOR THE PAROLE HEARING**

### **A. Reviewing the Client's Six Part Folder and Obtaining Client History and Trial Materials**

Counsel shall visit the client within ten business days of appointment. At that initial client meeting, Counsel shall have the client sign release forms so that counsel is able to start to obtain DOC files, parole files, attorney records, DYS records, DCF records, medical and mental health records, school and employment records and any other documents pertaining to the client's life.

After meeting with the client and getting the necessary release forms signed, counsel shall immediately contact trial and appellate counsel. If their files still exist, counsel should make an appointment to review the file and obtain copies of all relevant documents as soon as possible.

If trial and appellate counsel no longer have the client's files, Counsel shall call the SJC Clerk's office to find out if the trial transcripts are still there or are available at the Social Law Library.

Counsel shall try to obtain all files available from the Juvenile Court, the Superior Court, and the Supreme Judicial Court.

Sometime during the first two weeks after appointment, Counsel shall call the Records Clerk at the client's prison and make an appointment to review the client's Six Part Folder. Counsel should review the entire file, knowing that most prisons will not allow counsel to get copies of documents in the client's six part folder that

were created by other agencies, such as police reports, court transcripts, and DYS records. (This policy appears to be in conflict with M.G.L. c. 6, §§ 167-178 which provides that any agency authorized to handle, store, or disseminate CORI must provide reasonable access to such records to the prisoner and/or his or her legal representative.) The Parole Board, however, does not follow this policy and will generally provide counsel with everything the DOC and the DA's office provides to it (except grand jury minutes and autopsy reports, which it allows Counsel to review and take notes from, but not copy). If Counsel is able to obtain these documents from prior defense counsel or the client's Case Manager at the Parole Board as he or she gathers them, then fighting with DOC about the documents may be unnecessary.

Also upon appointment, Counsel shall contact the Lifer Unit at the Parole Board, inform the Board in writing of counsel's appointment and request the identity of the parole staff person who will be the Case Manager as soon as he or she is assigned to the case. Counsel shall request, in writing that the Case Manager provide to Counsel all records concerning the client's case (police reports, trial transcripts, mental health records, etc.) as s/he collects/receives them.

Counsel must thoroughly review all of these materials with the client in order to fully understand and investigate the client's life before the crime, the client's perspective of the crime, and his/her institutional history.

## **B. Developing a Theory in Support of Parole Release**

Counsel must develop a viable case strategy utilizing the factors set forth in M.G.L. 127, § 130, the factors set forth in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and the standard set forth for juvenile lifers in *Diatchenko II*: the parole hearing process must provide an "opportunity for release based on demonstrated maturity and rehabilitation." Counsel must be aware that s/he carries the burden of proof.

Counsel must be aware that in 2012, the Massachusetts legislature amended the statutory standard for parole release, adding factors that are more supportive of release on parole. See M.G.L. c. 127, § 130. The Parole Board, however, did not amend the standard in its regulations to comport with the new statute. See 120 C.M.R. 300.04, which still quotes the old version of c. 127, § 130. The Parole Board still uses the old regulatory standard in its opinions and sometimes quotes it at hearings. Counsel needs to be aware of the changes in the law.

Counsel must be fully versed in all pertinent statutory and case law regarding Parole decisions, including the following:

Counsel should be aware and must explain to the client that the Supreme Judicial Court has held that the Parole Board may consider any of the facts concerning the underlying alleged criminal behavior, even facts that describe a separate crime for which the client was never convicted, during the client's parole hearing. The Board may also consider facts regarding the gravity of the crime to assess whether the client has been sufficiently punished for his or her actions. *Greenman v. Massachusetts Parole Board*, 405 Mass. 384 (1989). Counsel should remember that although the Board often relies on *Greenman*, that case is from 1989 and concerns an adult. Counsel should be familiar with *Greenman* and be prepared to distinguish it.

Counsel shall be mindful that the Parole Board may consider aspects of the original charged offense(s), even though the client had pled down to a lesser crime(s). Counsel shall be aware of *Quegan v. Massachusetts Parole Board*, 423 Mass. 834 (1996), in which the SJC held that the Parole Board could deny parole to a prisoner who refused to admit that he committed the underlying crime for which he was serving time, even where the criminal case was pending on direct appellate review. There, the Court held that the prisoner had no due process liberty interest in parole and that placing him in a position of admitting his guilt, or forgoing parole, did not violate state or federal rights against self-incrimination. Again, this is a pre-*Diatchenko* decision concerning an adult crime and Counsel must be prepared to distinguish this case.

***i. Explaining the Threshold Test: Accepting Full Responsibility and Identifying the Causal Factors***

Counsel must acquaint the client with the threshold test outlined below, and shall explain it in language understandable to the client.

The Parole Board has adopted what seems to be a threshold test as to whether the client should be given serious parole consideration.

The first prong of the threshold test that Counsel must explain to the client is whether the client has admitted his or her culpability and accepted full responsibility for the underlying crime. The client needs to understand that this part of the test seems to be premised on the notion that unless and until the client is willing to accept culpability and responsibility for his or her past criminal

behavior, such criminal behavior is likely to reoccur in the future because the client lacks insight into the causal factors of the crime. The client needs to understand that the Parole Board relies heavily on this threshold test in reaching its statutory mandate under M.G.L. c. 127, § 130 of predicting the client's likelihood of recidivating if released on parole.

Counsel must explain to the client that, in evaluating the client's version of the crime, the Parole Board will consider whether he or she is accepting *enough* culpability for the crime in question. Counsel must explain to the client that if he or she appears not to be taking *full* responsibility for the crime during his or her narrative of the crime, it may significantly diminish his or her chances of being given serious parole consideration.

It is therefore extremely important that in preparing the client's testimony, Counsel spend a great deal of time exploring these issues. Counsel must continually impress upon the client that in his or her testimony, s/he must: 1) accept full responsibility or sometimes even more culpability and responsibility for the crime than s/he believes s/he deserves; (2) show insight into the causal factors but make no excuses; and (3) never attempt to shift the blame for the crime onto anyone or anything else. This does not mean that the client must falsely confess to a crime or exaggerate his/her involvement. Counsel should never encourage a client to lie about his/her involvement in a crime. Counsel needs to educate the client about the importance of taking responsibility and the importance of closely examining his/her participation in the planning, carrying out or covering up the crime.

Counsel shall also explain to the client and consider in planning a theory of parole that the Parole Board considers whether, in its view, the time the client has already served in prison is long enough to protect the public, punish the client for the crime, deter others, and allow for rehabilitation.

Counsel shall be aware that the Board will also examine the victim's conduct during the crime to see if s/he was blameless, was particularly vulnerable or acted altruistically.

The second prong of the threshold test that Counsel must explain to the client is whether the client has identified and adequately dealt with the causal factors of the crime during his/her incarceration. Counsel shall be cognizant of the fact that not all murders have identifiable causal factors, such as substance abuse or mental health illness, and shall prepare the client's case accordingly. The Board

will carefully look at whether the client has identified and properly dealt with the factors that caused him/her to commit the underlying crime and other crimes through institutional programming. In making this assessment the Board looks at what programs the client has participated in, what s/he got out of the program and whether there is evidence of genuine change as a result. The Board is also likely to look at the client's work, education and treatment history as required by G.L. c. 127, § 130. With respect to predicting the client's ability to be law abiding in the future, the Board may consider past probation, and bail failures, furlough failures, the extent of the client's criminal history, how long the prisoner has demonstrated good behavior in prison, and the degree of support s/he has in the community. The client needs to be ready to discuss these things.

Counsel shall also be familiar with the "Guidelines For Life Sentence Decisions," focusing primarily on whether the client has been rehabilitated to the point s/he can be safely released back into the community. Counsel must explain to the client that the Board will carefully consider the degree of remorse and level of understanding that the client has about the harm caused by the underlying crime and his or her past crimes. The client needs to understand that this consideration about the client's appropriate level of remorse is usually evaluated through the eyes of the victim, or victim's family in homicide cases. The client needs to be able to describe in a meaningful and detailed way the harm he thinks he caused the victim, or to the victim's family.

Counsel shall carefully examine all of the considerations in the Guidelines, and shall develop a theory of parole and prepare the client accordingly.

It is essential that Counsel spend a great deal of time with the client to prepare him/her to testify about his/her life before the crime, life at the time of the crime, the causal factors of the crime, the details of the crime, and the remorse felt by the client. These are very difficult concepts and require a great deal of attorney-client trust and understanding to develop.

***ii. Handling a Client's Assertion of Innocence***

For clients who maintain their innocence, Counsel must build an effective strategy around the client's maintaining his or her innocence. The very strong presumption at the hearing by the Parole Board is that the prisoner is guilty. While a parole release hearing is not the proper forum for the client to relitigate his or her underlying conviction, Counsel must not advise the client to lie at the Parole and falsely admit guilt. Counsel shall go through the "Guidelines For

Lifer Sentence Decisions” with the client so s/he can see firsthand just how difficult it will be to meet these standards while maintaining his or her innocence of the underlying crime. Counsel’s central message to the Board should be that the client has been sufficiently punished for this crime, that the problem areas in the client’s life at the time of the crime have been addressed during the period of incarceration, and that the client has matured, grown, stabilized, etc. If the client did not play a significant role in the underlying crime, counsel should point out how much time he or she has already spent in prison in light of that factor. Counsel should understand that clients who have asserted their innocence have, very occasionally, been granted parole and that is usually after the case is retried at the parole hearing. It is not impossible to assert innocence and be paroled – just close to it.

***iii. Evaluating, Addressing and Explaining the “Risk Posed To Society” by the Client’s Release***

Counsel shall explain to the client that parole is not granted merely as a reward for good conduct. M.G.L. c. 127, § 130. The “Guidelines For Life Sentence Decisions” state that the period of incarceration should be long enough to adequately protect the public and punish the offender. Counsel must understand risk assessments, in particular the Level of Service/Case Management Inventory (“LS/CMI”) the Parole Board uses. Counsel must decide whether s/he should have an expert administer a risk assessment to the client.

Counsel should be well-versed in the numerous studies discussing recidivism rates for those who committed their crimes as juveniles as well as the studies discussing recidivism rates for persons seeking parole after the age of fifty and older.

Counsel shall explain to the client that the Parole Board looks to the client’s support in the community and the strength of the parole plan in deciding on future risk.

***iv. Addressing the Sufficiency of Punishment***

Counsel shall explain to the client that in determining whether the client has been sufficiently punished the Parole Board will consider how much time the client has served on his or her sentence in light of the particulars of the underlying crime. Some of the factors that the Board will closely examine and should be explained to the client are: (1) the client's motive(s) in committing

the underlying crime; (2) whether the crime was particularly heinous, premeditated, repetitious, motivated by greed, or carried out against an extremely vulnerable party; (3) what role the client played in the underlying crime - mastermind, principal, or accomplice; (4) the extent of suffering experienced by the victim and/or the victim's family, and (5) whether the client has demonstrated any remorse about committing the crime. Counsel needs to be able to discuss how these factors should be weighted differently in the juvenile context.

**v. *Documenting the Client's Efforts at Treatment and Rehabilitation***

Counsel shall further explain to the client that the Parole Board will closely examine the client's efforts at rehabilitation during his or her incarceration. Among other things, the Board will consider the client's: (a) progression through the prison system; (b) participation in educational, rehabilitative, and treatment programs, especially including counseling; (c) participation in the furlough and work release programs; and (d) disciplinary record, returns to higher security, and placements in solitary confinement.

Counsel must become familiar with the programs at the prisons, and must understand that the programs available at different prisons vary greatly with respect to the types of programs available, the frequency with which they are available, and the number of spots available in each program. Since the current Parole Board places great weight on the client's treatment program participation, it is important to know what programs the client has participated in and how he or she has benefited from that experience. The Parole Board will also review the jobs the client has held while in prison, the educational programs completed and degrees earned and any other favorable factors from the client's institutional record. Counsel shall thoroughly review this information with the client in preparation for the hearing.

**vi. *Documenting the Client's Progression Through the Prison System and the Client's Disciplinary Record***

Counsel must be thoroughly familiar with the client's disciplinary record. Counsel shall review all copies of disciplinary reports with the client and prepare responses to the board's possible questions. Counsel shall explain to the client that the number and nature of the disciplinary convictions will be considered by the Board. The Board will be particularly concerned with any similarities between the underlying crime and the client's disciplinary record.

Counsel shall explain to the client that any pattern of similar kinds of antisocial behavior or substance abuse will usually diminish the client's chances. If the client has a long history of serious disciplinary infractions, this may also diminish his or her chances at parole, regardless of their nature. If counsel notices that the disciplinary infractions seem to be related to substance abuse or mental health problems, counsel should strongly recommend that the client seek treatment immediately and incorporate treatment into his or her parole plan. If Counsel notices that most of the client's disciplinary problems occurred early on in his or her incarceration, Counsel should be prepared with statistics and treatises concerning an adolescent's difficulty with incarceration and why young prisoners pick up an inordinate amount of disciplinary reports.

Counsel must review the client's criminal history prior to the hearing and prepare the client to discuss all entries on his/her record. Counsel shall explain to the client that the Board will question the client about his or her criminal history prior to the underlying crime, including all arrests, all dismissed cases, and any "Not Delinquent" cases. Counsel shall explain to the client that the Board will be looking for evidence that the client is a career criminal, suffers from mental illness, or is likely to re-offend if released on parole. Counsel shall prepare the client how to respond to questions intended to elicit such evidence.

If the client has just entered into treatment or programming recently, Counsel shall be prepared to argue to the Board that the client recognized his or her need for treatment in preparing for the hearing when Counsel brought it to his or her attention. Parole plans can incorporate a period of time in lower security where the client will have access to better treatment programs, or a long-term residential treatment program upon parole. These types of parole plans should address both the Board's concern over the immediate risk to the general public and the client's need for further treatment.

### **C. Scheduling the Hearing**

Counsel shall contact the parole board to schedule a hearing. Counsel should be aware that the initial parole release hearing is, by statute, held at least 60 days before the prisoner has completed serving 15 years on his or her sentence. M.G.L. C.127, § 133A. Counsel, however, needs to call the Parole Board Lifer Unit, to request a hearing date. As soon as Counsel knows the month during which s/he will be ready to proceed, Counsel should call the Board and request a hearing date. The calendar fills up quickly and Counsel needs to explain to the client that the

Board schedules hearings three or four months prior to the actual hearing date. Counsel needs to discuss the hearing date with the client so that the availability of family witnesses can be considered.

#### **D. Preparing for Witness Testimony**

##### *i. Witnesses in Support of Client*

Counsel should begin to contact witnesses for the client soon after accepting the assignment. See [Section 3\(c\)](#) for additional guidance on support witness preparation. Counsel should be aware that the parole board limits the prisoner to five witnesses, and five minutes per witness.

##### *ii. Witnesses in Opposition*

Counsel should be aware that the family of the victim may attend and speak in opposition to release. The client should be told that the Parole Board is required to send written notice of the hearing to (a) the victim, or the victim's family in a murder case, (b) the office of the District Attorney that prosecuted the underlying crime for which the prisoner is incarcerated, (c) the Chief of Police or head of the police department where the crime was committed, and (d) the Attorney General. 120 C.M.R. 301.06(3). Counsel should be aware that once notice to the opposition witnesses has gone out (30 days in advance of hearing), the Parole Board may be reluctant to postpone the hearing, particularly if the request is made at the last minute. A request for a postponement should be made to the Director of the Life Sentence Unit, at the Parole Board.

Counsel should inform the client that statements written by victim's family members in opposition to parole are not released to the prisoner or Counsel. Counsel should explain to the client that victims or family members of victims who testify must do so in the presence of the prisoner at the hearing. 120 C.M.R. 401.04(3). If Counsel believes the victims' letters of opposition discuss facts of the crime as opposed to victim impact, Counsel should ask to see those sections of the opposition letters.

Counsel shall check with the Case Manager just before the hearing to find out whether any letters of opposition have been submitted. The District Attorney's Office will frequently send a letter in opposition to parole, as well as testify. The DA's letter of opposition usually is produced the day of the hearing unless Counsel was able to contact the ADA ahead of time to get a copy.

## **E. Preparing for the Parole Staff Interview of the Client**

Counsel must spend considerable time preparing the client for the parole staff interview. All lifers facing parole are subject to this pre-hearing interview approximately twenty to thirty days prior to the parole hearing. This interview is conducted by the parole staff person who is the Case Manager assigned to the case. At present, Counsel is not permitted to attend this interview, although it is a subject of discussion and disagreement with the Parole Board.

Counsel must explain to the client that approximately sixty days before the staff interview, the client's Case Manager will give the client several forms to fill out and a blank parole questionnaire. Counsel must ask the Case Manager to email all forms and the blank questionnaire to him or her. Counsel shall explain to the client that he or she should not sign any forms or submit any documents to the Case Manager or Institutional Parole Officer without showing the forms to Counsel first. Counsel shall review these forms, (i.e. the Waiver of Hearing Conducted before the Full Board Membership form and release forms for both medical and mental health records) with the Client. Counsel shall discuss with the client his or her option to sign the Postponement form if the client does not wish to proceed with the hearing. Counsel shall explain the Waiver of Full Board and release forms to the client.

Counsel shall meet with the client well in advance of this staff interview to prepare for the interview and to answer the questions on the parole questionnaire. The completed questionnaire must be returned to the Case Manager no later than the day of the staff interview. By the time of the staff interview, the client must be prepared to discuss anything that pertains to the question of parole. This includes, but is not limited to, his or her family history and life history prior to the crime, his or her criminal history prior to the underlying crime, the client's mental health history both before prison and in prison, his or her version of the underlying crime, the causal factors of the crime and what the client has done to address those causal factors, details of any major disciplinary reports, the circumstances surrounding any returns to higher security, all of the rehabilitative work the client has done including programs, counseling, education, vocational training and jobs in the prison, and a detailed description of his or her exact parole plans.

Counsel must assist the client in filling out the parole questionnaire. Counsel shall review the questionnaire with the client prior to its completion and review it before it is submitted to the Case Manager. This questionnaire asks the client to describe

his or her life history prior to the crime, the client's version of the crime, the client's institutional accomplishments, disciplinary history, parole plans, and the support witnesses who will attend the hearing. The form also asks for Counsel's name and contact information. If either the Client or his witnesses requires an interpreter, Counsel must include that information on this questionnaire.

The completed questionnaire forms the basis for the staff interview. It is an extremely important document that Counsel must review very carefully with the client prior to its submission.

As part of the staff interview, the Case Manager will conduct a risk assessment evaluation on the client. This evaluation, the Level of Service/Case Management Inventory ("LS/CMI") will rate the client's risk to re-offend. Counsel must educate himself/herself about this risk assessment tool and be ready to answer both the client's questions and the Board's questions about the results.

Following the staff interview, the Case Manager will prepare a written summary of the client's case for the Parole Board's use during the hearing. This Staff Summary Report includes a summary of the official version of the crime and the client's version, the client's life history, the client's institutional accomplishments, disciplinary history, returns to higher custody, criminal history, release plans, and related information. During the hearing, members of the Parole Board rely on the Staff Summary Report while questioning the client in each of these areas.

The Summary Report and the LS/CMI Report will be provided to Counsel at least several days prior to the hearing. If they are not provided several days in advance of the hearing, Counsel must call and email the Case Manager requesting timely production of these documents.

Counsel must review the Staff Summary Report immediately upon receipt. If Counsel sees errors in the report, he or she must immediately call and email the Case Manager and request correction of the error(s). If notified promptly, the Case Manager will often correct the Summary Report prior to submission to the Board.

#### **F. Formulating a Re-Entry Plan**

Counsel must spend considerable time with the client formulating a re-entry/parole plan. Often, the client does not have a good understanding of what a realistic parole plan would be and Counsel will need to provide a lot of supportive counseling to

help the client understand what kind of re-entry plan should be proposed to the Board.

Although the client will make the ultimate choice about the components of the re-entry plan, it is Counsel's responsibility to provide as much information as possible to help the client make the best choice.

Counsel should explain to the client that the Parole Board almost always wants lifers to have spent time in lower security before being paroled to the street and that the Board wants most lifers to then spend their first 90 days on parole on the street in a long term residential treatment program before moving to their own home or apartment. Counsel should review juvenile lifer Records of Decision issued by the Board with his/her client to help the client understand the likely dispositions and to help the client design a realistic parole plan.

If part of the parole plan is residence in a program in the community, Counsel shall ensure that the client knows how to apply to these programs and has completed the applications prior to the parole hearing.

Counsel should investigate and document other components of a re-entry plan, such as counseling in the community, possible employment, future housing options, education, etc. Counsel should include this information in the Memorandum in Support of Parole and the client should be prepared to discuss these aspects of the parole plan at the parole hearing.

If the client has sex offenses on his/her record, Counsel will need to learn about the DOC's Sex Offender Treatment Program run out of the Massachusetts Treatment Center and about the Parole Board's Intensive Parole for Sex Offenders. Both agencies have special policies and regulations about the treatment, release and parole of persons with sex offenses on their records. The Parole Board places many more requirements on clients when they have a conviction for a sex offense and achieving parole/living on parole is more complicated.

## **G. Reviewing the Parole Binder**

Counsel must review the parole file, referred to as "the binder," that the Case Manager assembles for the Board members for the client's upcoming hearing. Counsel must schedule an appointment to review the binder. The "binder" is usually not completed until a week prior to the hearing. This "binder" will include the Staff Summary Report, all of the DOC documents pulled from the DOC file by

the parole staff, mental health evaluations, records of program participation, reports concerning vocational programs and jobs, reports of furloughs, the material supplied by the DA's office and all of the other documents the Case Manager has found concerning the client that arguably pertain to parole. Since the "binder" is generally not ready until about a week before the hearing, Counsel will need to stay in touch with the Case Manager to ensure access to this "binder" upon completion.

#### **H. Preparing the Client's Memorandum in Support of Parole**

Counsel shall file a Memorandum in Support of Parole one week prior to the hearing. Eight copies of the Memorandum must be delivered to the Parole Board office in Natick. The Memorandum shall discuss, among other things, the client's life before the crime, the crime, the client's institutional history and rehabilitation, the causal factors of the crime, the factors set out in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), in *Diatchenko II*, and in M.G.L. c. 127, § 130. Counsel's theory of parole/argument for parole should be clearly expressed in the memorandum.

Counsel shall append to the Memorandum, or file an Appendix, containing any supporting documents including letters of support from family and friends, letters of employment and housing offers, treatises which support the client's parole, certificates of program completion from the DOC, and educational and vocational accomplishments.

### **3. THE PAROLE HEARING**

All parole release hearings of prisoners serving life sentences are public proceedings. M.G.L. c. 127, § 133A. Counsel should ensure that all supporters who wish to see the hearing either have a seat in the hearing room or the overflow room.

Counsel must notify the Case Manager several days before the hearing of the total number of anticipated supporting spectators. Counsel should count the five supporting witnesses who testify amongst the total number of supporting spectators.

Counsel shall have the following materials organized and accessible at the hearing:

- Copies of all relevant documents in the case;
- An extra copy of the Memorandum in support of parole;
- Relevant documents prepared by evaluators;
- Outline of Counsel's opening statement and the client's opening;

Any notes or outlines the client may need to refer to during his/her hearing testimony;

Outline of support witnesses' testimony;

Outline or draft of Counsel's closing argument and the client's closing.

#### **A. Opening Statement by Counsel and Client**

The issue of who delivers the opening and how to divide the time between Counsel and the client must be determined through Counsel's meetings with the client. The usual practice is for the client to speak first for one or two minutes, followed by Counsel, but this needs to be determined and agreed upon, with the client, in each case.

The client usually makes a public apology for the commission of the crime during his/her part of the opening. Counsel must spend considerable time working with the client to prepare this statement. In addition to helping the client prepare an apology to include in the opening, Counsel should also help the client determine what else to include in the client's opening and then practice it with the client.

Counsel must remember to instruct the client to face the Board when making this opening statement. The client is NOT permitted to turn around and face the victim's family.

Counsel should advise the client to not discuss his suffering or his family's suffering that occurred during the client's imprisonment in his/her opening statement. The client should also be advised to NOT ask the victim's family for forgiveness in his/her opening statement.

#### **B. The Client's Testimony**

In preparing the client for this hearing, Counsel needs to ensure that the client will be able to physically and mentally tolerate and respond to approximately two hours of intense questioning and to then thoughtfully listen to an additional hour of witness testimony.

Counsel shall select the DVDs from two other juvenile lifer hearings before the Parole Board and request that the Board mail those DVDs to the client to watch as part of the preparation for testifying.

*i. The Client's Life Before the Crime*

Counsel shall prepare the client to testify about his/her life before the crime. The Board will be looking to see if the client has gained any insight into figuring out how the circumstances of his/her life contributed, if at all, to the commission of the crime. The client must be prepared to discuss such things as school problems, drug/alcohol problems, abuse, neglect, poverty, gangs, mental health issues, peer pressure and any other aspects of his/her life before the crime.

*ii. The Underlying Crime*

Counsel must prepare the client for intense questioning from the parole board about the facts of the crime. The Board prefers to hear from the prisoner directly without any help or direction from counsel. Counsel, however, must be prepared to interject (“Excuse me, Board member X, but . . .”) during the hearing if questions contain clearly erroneous facts or contain improper assertions. Counsel must caution the client to not answer questions s/he does not understand and Counsel must intercede if necessary when it appears that the client is not able to understand a particular question.

Counsel must prepare the client for a sometimes contentious and confrontational manner of questioning. Board members will focus on any factual inconsistencies between the client's account of the crime and the official version and Counsel must prepare clients to answer questions about these alleged inconsistencies. Members of the Board will be trying to assess whether the client is ready to fully admit what he or she did in factual terms and accept full responsibility for the crime. Counsel must help the client understand that it is not enough for the client to simply say that he or she committed the crime and accepts full responsibility; Counsel must help the client discuss in detailed factual terms exactly what the client did and why.

Counsel should caution the client not to deny, mitigate, or attempt to justify his or her actions during the crime. Counsel needs to help the client understand the connection between the causal factors—such as substance abuse, mental health issues, domestic abuse, or anger management problems—and the crime and then help the client prepare his/her testimony about that connection.

Counsel will need to prepare the client how to testify if the client has done little or no programming during his or her incarceration to address the causal factors of his or her crime.

Counsel must be ready to ask for an accommodation if the client has a disability which affects his/her ability to testify at the parole hearing.

***iii. Institutional Accomplishments and History***

Counsel shall advise the client that once the lead questioner has completed asking the client about the client's life before the crime, the underlying crime and any other past crimes, the client will be asked about his or her institutional record. Counsel needs to prepare the client to testify about all of his institutional accomplishments. In particular, the client needs to be able to explain what s/he learned from each program or class. Counsel may determine that the client needs a list or outline of accomplishments to glance at during the hearing. Often, the Board's primary emphasis is on the negative aspects of the client's institutional record. Board members may delve into the client's disciplinary infractions, returns to higher security, placement in solitary confinement and related matters in great detail. This will sometimes be done by combative cross-examination questions that leave very little room for explanation. Counsel shall advise the client that if s/he has a plausible explanation about something negative, s/he should try to provide it even if the Board member does not ask for an explanation.

***iv. Parole Plans***

Counsel must develop and present a re-entry plan. The plan must be well thought out and realistic. The client must be prepared to discuss the parole plan at the hearing and to explain why s/he made these choices. Please see below, "Section IV Disposition", regarding formulating a parole plan.

**C. Support Witnesses' Testimony**

Counsel must assist in identifying and preparing supporting witnesses. Counsel shall get the names and contact information for all potential witnesses at an early meeting with the client. Counsel shall interview all potential support witnesses and recommend to the client the five persons who Counsel believes will be most helpful to the client's request for parole. Once Counsel and the client have selected the five witnesses, Counsel shall work with each witness to prepare five minutes of

narrative testimony. Counsel should provide the witness with an outline of what should be contained in the testimony and should review the testimony with the witness, at least once, to ensure that the testimony can be delivered in less than five minutes. Counsel must be certain that each witness understands that s/he will only be given five minutes to testify.

While only five support witnesses actually testify at the hearing, Counsel shall ensure that all of the client's supporters know the date and time of the hearing well in advance of the hearing and understand the importance of attending the hearing.

Counsel should ensure that all supporters, whether they are testifying or not, have written letters documenting their support to the Parole Board. Counsel shall collect these letters and attach them to his/her Memorandum in Support of Parole.

#### **D. Opposition Testimony**

Counsel must prepare the client for the opposition testimony and its content. Counsel must prepare the client to not react to opposition testimony, no matter how offensive. Counsel should not interrupt an opposition witness during his or her testimony. Counsel shall prepare the client to expect opposition witnesses to vent their anger directly at the client, and to say extremely hostile and provocative things about him or her. The client should be advised to simply look down, or look sad or thoughtful during this testimony, but to not shake his/her head, look annoyed, look dismissive, etc. The client should be advised that the Board members watch the client during the opposition testimony.

#### **E. Closing Statement**

Counsel must discuss with the client whether Counsel or the client or both should make the closing statement. Often, Counsel and the client decide to divide the time, with Counsel speaking first and the client closing the hearing. If the closing is going to be shared, Counsel must prepare both his/her own closing, and also help the client prepare a closing. If the client is going to be making all or part of the closing, Counsel must meet with the client and review and practice the closing.

#### **F. Submitting Supplemental Evidence and Keeping the Record Open**

At the close of evidence and before beginning closing argument(s) for the client, Counsel should consider whether anything occurred during the hearing which appeared to concern the Board and for which Counsel has additional points to make or evidence to produce. Often, something will have occurred during the

opposition testimony that needs to be corrected. The regulations provide that at the close of the hearing, the Board may allow any party reasonable additional time to submit supplemental evidence if the request is made by the close of the hearing. 120 C.M.R. 301.06(8). After closing argument, Counsel should ask the Chairperson to keep the record open “X” number of days to permit Counsel to file additional materials relating to “X.” The record will be kept open until the date set by the Chair.

#### **4. THE PAROLE BOARD’S WRITTEN RECORD OF DECISION**

Counsel shall explain to the client that at the close of the hearing the Parole Board will take the matter under advisement and subsequently vote on the issue of parole during one of its weekly executive meetings. Counsel should advise the client that the regulations fail to specify how long the Board has to issue a written Record of Decision and that often the Board takes up to four months to issue a decision.

Counsel shall advise the client to call his/her office as soon as s/he receives the Record of Decision.

Immediately upon learning that a Record of Decision has been issued, Counsel must contact the Parole Board (the client’s Case Manager) and request a copy of the Record of Decision.

Counsel shall visit the client as soon as practicable after the Record of Decision has been issued to review the decision in detail with the client.

#### **5. POST-HEARING PROCEEDINGS**

Counsel shall advise the client that s/he has a right to appeal the parole denial and that s/he also has a right to ask for reconsideration. Counsel shall explain these two procedures, as set forth in the regulations, detailing what each entails and what one can hope to accomplish with each procedure.

##### **A. Right of Appeal**

Counsel should advise the client that an appeal involves several steps and that the first step is a written appeal back to the very same people who denied the client’s parole (the “administrative appeal”). Counsel should explain that, although an administrative appeal will take months to resolve, it is a necessary and required step in order to preserve the client’s right to pursue relief in the Superior Court, Appeals Court, or the SJC.

Counsel shall timely file (30 days from the date of the Record of Decision) an administrative appeal if the client decides to pursue an appeal.

The Director of Juvenile Appeals and the Director of the YAD Trial Panel should be consulted immediately upon the denial of any administrative appeals. Counsel and the client shall discuss next steps, and determine whether an appeal to the Superior Court or other appellate relief should be filed.

If YAD determines that the client's interests are best served by having a different attorney handle the administrative or Superior Court appeal, new counsel shall be appointed for that purpose.

## **B. Continuing Duty to Represent**

Counsel has a continuing duty to represent the client through all administrative appeals and court appeals. Counsel shall advise the client of all appeal rights and shall work with the client to secure services to obtain a favorable vote with the parole board at the client's future hearing.

The parole process takes place in a continuum. A client appears before the parole board and is afforded a hearing for his or her current situation. When a setback occurs, remediation is necessary and further representation is required for a meaningful opportunity for parole. The process does not end, because a denial of parole is never final. It must be reconsidered at least once every five years.

If the board provides a setback, Counsel shall attempt to identify and secure services in the client's facility in order to remediate identified issues.

## **C. Reappointment of Counsel**

In cases where the client is given a setback, Counsel shall continue to provide representation as noted above. Counsel shall be reappointed one year prior to the next parole hearing date.

## **F. PERFORMANCE STANDARDS GOVERNING REPRESENTATION OF CLIENTS ON CRIMINAL APPEALS POST-CONVICTION MATTERS**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

- xv.** The role of appellate defense counsel is to diligently and zealously seek to vindicate the convicted client's substantive and procedural rights and interests through the appellate process on all matters within the scope of counsel's assignment. It is counsel's duty to give the client counsel's undivided loyalty free of any conflicts of interest, and to maintain the confidentiality of all client communications. Counsel's commitment to these duties and obligations must remain unaffected by the client's indigent status, the client's background, or the nature of the case. All clients deserve and must be afforded the same undivided loyalty, confidentiality, competent representation, and zealous advocacy.
- xvi.** Immediately upon receipt of the assignment of a direct appeal or new trial motion, the appellate defender shall: (a) file an appearance in the appropriate court, (b) communicate with the client to inform the client of the assignment, and (c) determine that the necessary transcripts and tapes have been ordered. Immediately upon receipt of the assignment of a screening concerning a motion to withdraw guilty plea, the appellate defender shall communicate with the client to inform the client of the assignment but should only file an appearance after the appellate defender has conducted a review and determined that there is a meritorious basis for the motion. Upon receipt of the assignment of a screening other than a motion to withdraw guilty plea, the appellate defender may, but is not required to, contact the defendant. The appellate defender in a screening assignment other than a motion to withdraw guilty plea should file an appearance in court only after assignment of counsel has been approved by the Director of Criminal Appeals, Private Counsel Division, as the Chief Counsel's designee.
- xvii.** The appellate defender shall keep the client informed of all significant developments in the client's case. The appellate defender shall respond in a timely manner to all correspondence of a reasonable volume and frequency. The appellate defender shall

accept collect telephone calls from an incarcerated client of a reasonable number and frequency.

- xviii.** Within three weeks after the receipt of the transcript, the appellate defender shall have read the entire transcript of the case. If the appellate defender is still subject to CPCS' mentor requirements, as determined by the Director of Criminal Appeals, Private Counsel Division, the appellate defender shall immediately provide the mentor with a copy of the transcript and shall confer with the mentor as to the issues to be raised in the appeal. Whether or not still subject to mentor requirements, the appellate defender may also confer at any time with the Director or the staff attorneys of the Criminal Appeals Unit of the Private Counsel Division.
- xix.** After reading the transcript, the appellate defender shall visit the client at the institution at which the client is incarcerated, or, if the client is not incarcerated, shall invite the client to visit the appellate defender at the appellate defender's office, for the purpose of conferring with the client about the issues that may be raised on the client's appeal.
- xx.** If specifically requested by the client, the appellate defender must provide the client with a copy of the transcript and other trial-related materials and/or a copy of a draft of the brief.
- xxi.** If, after the conference described in Standard 5, the client insists on having briefed a contention that, in the judgment of the appellate defender, cannot be supported by any rational argument, the appellate defender (a) shall inform the client of the client's right with respect to such contention pursuant to *Commonwealth v. Moffett*, 383 Mass. 201, 203-209 (1981); and (b) shall supply the client with a copy of the Moffett opinion. If the client thereafter wishes to invoke his or her *Moffett* rights with respect to such contention, the appellate defender shall comply in all respects with the guidelines of the *Moffett* case set forth id. at 208-209 & n. 3.
- xxii.** If it appears to the appellate defender that, in light of the standards set forth in *Commonwealth v. Hodge* (No. 1), 380 Mass. 851, 855 (1980), there is a reasonable possibility that an incarcerated client might receive a stay of sentence pursuant to Rule 31 of the Massachusetts Rules of Criminal Procedure or Rule 6 of the Massachusetts Rules of Appellate Procedure, the appellate defender shall bring in the appropriate court a motion to stay the client's sentence.
- xxiii.** The appellate defender must be familiar with and must comply with all court rules and standing orders, including the Massachusetts Rules of Criminal Procedure and

Appellate Procedure, as well as the Rules and Standing Orders of the Supreme Judicial Court and the Appeals Court, and particularly with Appeals Court Standing Order 17A.

- xxiv.** The appellate defender shall timely file in the appropriate court all motions necessary or advisable to preserve and perfect the client's appellate rights, including, where necessary, motions pursuant to Rule 14(b) of the Massachusetts Rules of Appellate Procedure to enlarge the time for filing the brief on behalf of the client, and motions pursuant to Rule 8 of the Massachusetts Rules of Appellate Procedure to correct or expand the record.
- xxv.** The appellate defender shall take the measures necessary to cure unreasonable delay in the production and assembly of the record on appeal, particularly the production of transcripts and tapes of the trial court proceedings. Such measures include contacting the court clerk, court reporter, or court administration and, if necessary, seeking a court order to cure unreasonable delay.
- xxvi.** The appellate defender shall not file or litigate a motion for new trial (Mass. R. Crim. P. 30) or any other collateral attack on the defendant's conviction without first having obtained the approval of the Director of Criminal Appeals, Private Counsel Division.
- xxvii.** The brief filed by the appellate defender on behalf of the client shall conform in all respects with Rules 16, 18, and 20 of the Massachusetts Rules of Appellate Procedure and shall be of high quality.
- xxviii.** In any case in which the defendant faces lengthy incarceration, probation, or parole, the appellate defender shall consider whether there are federal constitutional claims which, in the event that relief is denied in the state appellate courts, could form the basis for a successful petition for a writ of habeas corpus in federal district court. If so, the appellate defender should raise and argue such federal constitutional claims, unless the appellate defender concludes that there is a tactical basis for not including such claims and the client assents.
- xxix.** The appellate defender shall transmit to the client a copy of the brief filed on the client's behalf and shall also transmit to the client a copy of the brief for the Commonwealth as well as copies of all other substantive documents in the appellate proceedings. Assigned counsel must also submit a copy of the brief or new trial motion to the Criminal Appeals Unit, Private Counsel Division.
- xxx.** Because there is no longer a right to oral argument in every criminal appeal, the appellate defender shall file a reply brief when necessary to respond to any portion

of the Commonwealth's brief that either (1) raises significant new issues not discussed in the appellant's brief; or (2) materially misrepresents the facts or the law, or (3) materially misrepresents the issues or arguments raised in the appellant's brief.

- xxxii.** The appellate defender shall promptly inform the client of the date, time and place scheduled for oral argument of the appeal as soon as the appellate defender receives notice thereof from the appellate court. The appellate defender shall not waive oral argument except in very unusual circumstances and only after (1) obtaining the approval of the Director of Criminal Appeals for the waiver and (2) obtaining the client's consent to waive oral argument.
- xxxiii.** The appellate defender shall promptly inform the client by letter of the decision of the appellate court in the client's case and shall promptly transmit to the client a copy of the decision.
- xxxiiii.** If the decision of the Appeals Court is adverse to the client in whole or in part, the appellate defender shall promptly inform the client of the client's right pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure to make application to the Supreme Judicial Court for further appellate review of the case. Unless the client instructs the appellate defender not to do so, the appellate defender shall prepare and file on the client's behalf an application to the Supreme Judicial Court for further appellate review of the case within the time prescribed by said Rule 27.1. When the Supreme Judicial Court has ruled on the application for further appellate review, the appellate defender shall promptly inform the client by letter of the ruling.
- xxxv.** In the event that the client's appeal is unsuccessful, the appellate defender shall have the discretion, upon the request of the client and subject to the approval of the Chief Counsel or the Chief Counsel's designee, to seek relief from the client's conviction by petition for writ of certiorari to the United States Supreme Court or in state court by a motion for new trial or other post-conviction relief when in the best judgment of the appellate defender there exists a reasonable possibility that such relief may be obtained.
- xxxvi.** In the event that the client's appeal is unsuccessful, the appellate defender shall advise the client of his right to seek federal habeas corpus relief if such relief is potentially available. Upon the request of the client, and subject to the approval of the Chief Counsel or the Chief Counsel's designee, the appellate defender shall request authorization for the appellate defender, or other counsel, to seek federal habeas corpus relief on behalf of the client, when in the best judgment of the appellate defender there exists a reasonable likelihood that such relief may be obtained.

- xxxvi.** In any case in which federal habeas corpus relief is potentially available but in which the appellate defender does not continue representation, the appellate defender shall explain to the client the one-year statute of limitations for the filing of a petition for a writ of habeas corpus in federal district court or for the filing of a motion for new trial in the state trial court when necessary to exhaust any federal constitutional issues for federal habeas review.
- xxxvii.** If a direct appeal is unsuccessful and a motion to revise and revoke sentence pursuant to Mass. R. Crim. P. 29 was either never previously filed or had been filed but denied, the appellate defender shall inform the client of the opportunity to file within sixty days a motion to revise and revoke sentence and, if the client requests, shall timely file such motion so as to preserve the client's rights under Mass. R. Crim. P. 29. The appellate defender is authorized to further litigate the motion to revise and revoke but is not required to do so.
- xxxviii.** Representing clients before the Appellate Division of the Superior Court is the responsibility of trial counsel. However, if trial counsel is unable to represent the client before the Appellate Division of the Superior Court, then the appellate defender is obligated to do so.

**G. PERFORMANCE STANDARDS GOVERNING THE  
REPRESENTATION OF CLIENTS IN CIVIL  
COMMITMENT CASES**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

These standards generally describe the steps which should be taken by an attorney who is assigned pursuant to G.L. c. 123, § 5, to represent a person in a civil commitment case who risks a six-month or one year civil commitment in a mental health facility. [See also [standards for authority to treat proceedings](#) which follow this section.]

- xxxix.** The role of the attorney in a commitment case is to act as an advocate for the respondent, in opposition to the petition and to insure that the respondent is afforded all of his/her due process and other rights. At a minimum, counsel must insure that the petitioning facility is made to meet its burden of proving, beyond a reasonable doubt, that the respondent meets the criteria for commitment.
- xl.** Immediately upon receipt of the assignment of a case the attorney shall: (a) file an appearance in court; (b) communicate with the client to inform the client of the assignment; (c) arrange to meet with the client (if the attorney's schedule does not permit him/her to meet with the client no later than the next business day and promptly begin to work on the case, the attorney shall decline the assignment); and (d) shall not agree to a continuance of the case without first consulting with the client and obtaining his/her consent.
- xli.** The attorney shall meet with the client as soon as possible, but in no event later than the next business day following the assignment. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, to explain the commitment law and procedures to the client, to discuss the alternatives to continued hospitalization available to the client, to determine the client's version of the facts which led to the filing of the petition, and to determine the client's wishes regarding the litigation. While not required, the attorney should seek to obtain from his/her client written authorization to examine the client's medical record or, where the client is unable or unwilling to provide such authorization, a court order authorizing such examination. Finally, the attorney shall discuss the possibility of an independent evaluation.
- xlii.** If the attorney believes an independent examination will aid the client, the attorney shall file a motion for funds for an independent examination by a clinician of the client's choice and at the Commonwealth's expense. The client should be advised that such an examination will take time and may cause delay. The attorney shall take steps to minimize any delays that may result from the decision to obtain an independent examination, given the deprivation of liberty the client is experiencing. The decision as to whether to retain the services of a clinician is the attorney's. The attorney must, of course, discuss the purpose, parameters and confidential nature of the clinician's examination with the client. However, since a client must consent to any continuance of the hearing, if an independent examination will necessarily require a continuance and the client objects, the attorney must go ahead with the hearing as scheduled, despite his or her view that an IME would be helpful in preparing the client's case.
- xliii.** The attorney shall contact the independent clinician if a motion for funds is allowed. The attorney shall remind the doctor that his/her report is the property of the client

and should be sent to the attorney, and that the report is not to be filed with the court or disclosed to the hospital attorney or staff without the permission of the patient's attorney. See *Commonwealth v. Thompson*, 386 Mass. 811 (1982). The attorney should also remind the doctor that the purpose of the examination is to evaluate: (i) the client's current mental state; (ii) the likelihood of serious harm if the client were to be discharged; (iii) the client's ability to care for himself outside of the hospital; (iv) the feasibility of any less restrictive alternatives to hospitalization; and (v), if commitment to Bridgewater State Hospital is sought, the need for "strict security."

- xliv.** The attorney shall thoroughly investigate the facts. This investigation shall include reading the complete medical records and interviewing the hospital staff, including the doctors, nurses, social workers and other staff. The attorney should also speak to other patients on the ward, friends and family members of the client, and staff of any other programs familiar with the client.
- xlv.** The attorney shall use formal discovery mechanisms if indicated and tactically advisable.
- xlvi.** After reviewing the medical record and the commitment petition, the attorney shall determine if any procedural defenses can be raised and, if appropriate, file appropriate motions with supporting memoranda. (Procedural defenses can be raised, for example, if the hospital failed to file the petition at the appropriate time or if the hearing has not been commenced within the five- or fourteen-day time period required by the statute, or if the petition fails to set forth facts in support of the petition. See *Hashimi v. Kalil*, 388 Mass. 607 (1983) and G.L. c. 123, § 7(c). A Motion to Dismiss should also be filed where a client is on a conditional voluntary status, is competent to remain on that status and has not submitted a three-day notice. See *Acting Superintendent of Bournewood Hospital v. Baker*, 431 Mass. 101 (2000)).
- xlvii.** After developing a thorough knowledge of the law and facts of the case, the attorney shall meet again with his/her client for the purpose of discussing strategy and alternatives to commitment. The attorney shall discuss with the client any available alternatives to commitment. These may include the participation in an out-patient psychotherapy and counseling program, a community support program, a day treatment program, or placement in a less restrictive environment such as a half-way house, a group residence, or an apartment program. A less restrictive alternative may also include remaining in the hospital on a conditional voluntary basis if the client desires to do so, is competent to remain at the hospital on this status and elects this after consultation with counsel. See G.L. c. 123, § 11 and 104 C.M.R. 27.06 (1) (d). The attorney should make it clear to the client that the ultimate decision regarding the proposal of alternatives to commitment must be made by the client. In discussing

possible alternatives, the attorney shall also explain the collateral consequences of a civil commitment, including preclusion from obtaining a firearms license and submission of the client's name to a federal database for purposes of firearms background checks. The attorney should reassure the client that the attorney will stand behind the client's decision and forcefully advocate the client's position.

- xlvi.** After this client meeting, and if appropriate, the attorney shall enter into negotiations with relevant persons concerning the case (e.g. discussions with the treating physician(s) regarding alternatives to hospitalization; discussions with social workers and DMH area office officials or other providers regarding the availability of alternative placements).
- xlvii.** If the attorney and the hospital can agree to a negotiated settlement the attorney shall meet with her/his client to explain the terms of the agreement and obtain the client's consent to the settlement. Should the client decline the settlement offer, the attorney shall be prepared to try the civil commitment case.
  - i.** The attorney shall discuss with the client whether the client would like to have the hearing held at the hospital or the courthouse and file a motion for a change of location if warranted. Prior to the hearing the attorney shall identify potential witnesses who will testify in support of the client. Where necessary, witnesses should be subpoenaed. The attorney shall meet with the witnesses in advance of the trial in order to prepare them for direct and cross-examination. The attorney shall review the medical record and identify those parts of the record which should not be admitted into evidence. The attorney should determine the identity of the hospital's witnesses in advance of the hearing, and make an effort, if tactically indicated, to interview them on the record and prepare appropriate cross-examination. The attorney shall discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney shall thoroughly prepare the client for direct and cross-examination.
  - ii.** During the hearing the attorney shall act as a zealous advocate for the client, ensuring that the proper procedures are followed and that the client's interests are well represented. The attorney shall seek rulings on any pre-trial motions and make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal. The attorney shall seek to ensure proper recording of the proceeding such that an audible transcript is capable of being produced.
  - iii.** After the hearing, the attorney shall meet with the client to explain the court's decision. If the client is committed, the attorney shall explain the client's right to appeal pursuant to G.L. c. 123, § 9(a) and the client's right to file a petition for

discharge in the superior court under G.L. c. 123, § 9(b), and shall assist the client in doing so. (Where an appeal is filed the attorney shall, without delay, notify CPCS' Mental Health Litigation Unit in order that appellate counsel may be assigned). The attorney shall review the evidence which was presented at the hearing in order to advise the client about any steps the client can take during the commitment period in order to be discharged from the hospital. In addition, the attorney shall send a closing letter to the client informing the client in writing of the court's decision, explaining the client's right to appeal pursuant to G.L. c. 123, § 9(a) within 10 days of the date of the order, as well as the client's right to file a petition for discharge in the superior court under G.L. c. 123, § 9(b). The closing letter shall inform the client that his or her representation has concluded, but that the client may request counsel for a 9(b) application for discharge or for review of an 8B treatment order at any time by contacting the Mental Health Litigation Division directly.

#### **H. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF INDIGENT ADULTS IN GUARDIANSHIP PROCEEDINGS UNDER G.L. C. 190B (INCLUDING "SUBSTITUTED JUDGMENT" MATTERS) AND IN AUTHORIZATION TO TREAT PROCEEDINGS UNDER G.L. C. 123**

These standards describe the steps which must, at a minimum, be taken by an attorney who has been assigned to represent an adult client in the Probate Court Department against whom has been initiated a guardianship proceeding, pursuant to G.L. c. 190B, or a client in the District Court Department against whom a petition seeking the authority to administer antipsychotic medication or other medical treatment for mental illness has been filed, pursuant to G.L. c. 123, § 8B. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct, as well as all applicable CPCS policies and procedures.

1. The role of counsel is to diligently and zealously advocate on behalf of his or her client, within the scope of the assignment, to ensure that the client is afforded all of his or her due process and other rights. To that end, only in exceptional circumstances may counsel stipulate to the client's incapacity; provided, however, that in proceedings in which a substituted judgment determination is required, counsel must oppose the petition and present "all reasonable alternatives" to the proffered treatment for the court's consideration. *See In the Matter of Moe*, 385 Mass. 555, 567 (1982); *Superintendent of Belchertown State School. v. Saikewicz*, 373 Mass. 728, 757 (1977).

Further, under G.L. c. 190B, upon a finding of incapacity, the probate court is required to

exercise [its] authority . . . so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure.

G.L. c. 190B, § 5-306(a). Thus, full or plenary guardianship is to be the exception, rather than the rule. To that end, counsel must ensure that, in those cases in which his or her client is found to be incapacitated, the guardian's authority is strictly tailored to the specific decision-making needs of the client.

2. Immediately upon receipt of the assignment, the attorney shall (a) file an appearance with the court; (b) notify petitioner's counsel of the assignment; and, (c) obtain a copy of the petition, the medical certificate or clinical team report, and any affidavit(s), documents or other pleadings that were filed with the petition.

3. Also immediately upon assignment, the attorney shall contact the client to inform him or her of the assignment and to schedule an initial meeting. The attorney shall meet with the client as soon as possible thereafter, but in no event later than one week prior to the return date set by the court; provided, however, that the attorney shall meet with the client no later than the next business day following the assignment whenever a petition for the appointment of a temporary guardian or for a substituted judgment determination is filed, or whenever an expedited hearing or other proceeding is sought or scheduled. <sup>1</sup> If the attorney is unable to meet with the client in accordance with this section and to promptly begin working on the case, or if the attorney is unable to appear in court on the assigned date, he or she shall decline the appointment.

At this initial meeting the attorney shall, at a minimum, explain to the client the purpose of and procedures involved in the impending guardianship proceeding, the client's rights and options in respect to the proceeding, and ascertain the client's wishes and perspectives as to the matters that will be at issue. <sup>2</sup> The attorney shall explain his or her role and those of the other participants in the proceeding. <sup>3, 4</sup> While not

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<sup>1</sup> As a general rule, the attorney should not agree to a continuance sought by petitioner without first consulting with the client. After such consultation, and unless the attorney determines that the client's legal or clinical interests would be adversely affected, he or she may agree to the continuance.

<sup>2</sup> Rule 1.14 of the Massachusetts Rules of Professional Conduct affords attorneys guidance as to their ethical responsibilities in dealing with clients "under a disability." The rule provides that, as with other clients, attorneys generally should follow the wishes of their cognitively, emotionally, or otherwise impaired clients, and provides suggestions as to steps that might be taken when an attorney has serious doubts as to his or her client's ability to competently direct litigation or other legal matters. The rule recognizes, however, that in some circumstances, mental health proceedings specifically noted among them, such a course of action may be impermissible:

Such circumstances arise in the representation of clients who are competent to stand trial in criminal, delinquency and youthful offender, civil commitment and similar matters. Counsel should follow the client's expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.

Mass. R. Prof. C. 1.14, cmt. 7 (taking protective action).

While the “default” position of adhering to the client’s expressed (albeit inadequately considered) decisions may seem reasonable, the imposition of guardianship (i.e., the removal of a client’s fundamental right to make his or her own decisions) or treatment with those modalities requiring a substituted judgment determination absent the true informed consent of the client is a substantial deprivation of liberty and, therefore, most certainly “pos[es] a risk of substantial harm to the client.”

<sup>3</sup> If the client refuses legal representation, the court must determine whether his or her waiver is “competent.” SJC Rule 3:10, § 3. If he or she is not competent to waive counsel or is “otherwise unable effectively to exercise [his or her] rights at a hearing,” standby counsel must be appointed. SJC Rule 3:10, § 3. If the client objects to a particular attorney despite that attorney’s best efforts to establish an effective professional relationship, the attorney should move the court to permit him or her to withdraw, and move that successor counsel be assigned. In doing so, of course, counsel must be careful to avoid divulging any confidential information or other information that could be harmful to the client’s interests. The court should determine whether the person’s objections are reasonable. If so, the motions should be allowed and successor counsel appointed. If not, the motion to withdraw should be denied and the attorney should continue as counsel or be directed to serve as “standby counsel.” SJC Rule 3:10, §§ 3, 6.

<sup>4</sup> Where counsel has been assigned but prior to the commencement of a hearing the court determines that the client is not indigent, the court may dismiss assigned counsel and advise the client to retain private counsel. However,

if the interests of justice so require [], the judge shall authorize the continued services of appointed counsel at public [i.e., CPCS] expense. The interests of justice may require such appointment if, for example, the party is incompetent to obtain counsel, incapable of obtaining access to funds, or incapable of locating or contracting with a lawyer.

SJC Rule 3:10, § 5. If the client is advised to retain private counsel, the attorney who had been previously assigned may be retained, provided that he or she fully explains to the client that such representation may create “the appearance of impropriety, solicitation, or overreaching.” If the client nevertheless wishes to retain the attorney, the attorney must obtain a written statement

required, the attorney should seek to obtain from the client written authorization to examine and copy the client’s medical records or, where the client is unable or unwilling to provide such authorization, a court order authorizing same.

4. The attorney shall thoroughly investigate the facts. This investigation shall include at a minimum (a) a review of the medical certificate, or the clinical team report, filed with the petition, and an interview of the clinician(s) who conducted the examination(s) upon which the certificate or report is based; (b) for a client who is or has been residing in a mental health, developmental disability or nursing facility, a review of (i) facility records, including medication history, (ii) treatment review notes, including diagnoses, treatment history, and comments regarding the client’s capacity, (iii) unit and nursing notes, for notations as to the client’s relationship and cooperation with staff and treatment programs, and (iv) the client’s Individual Service Plan or similar document;<sup>5</sup> (c) an interview of the petitioner, current treatment providers, staff (including doctors, nurses, and social workers) of current residential programs, if applicable, and of former providers and program staff if reasonably accessible; and (d) other persons familiar with the client, such as friends and family. The attorney shall also determine whether the client has executed, or is capable of executing, a health care proxy, durable power of attorney, or similar instrument delegating authority to a surrogate decision-maker, that would obviate the need for the appointment of a guardian.

5. In most instances, independent psychiatric or psychological expertise will be of assistance in the preparation and defense of the proceeding, particularly in the assessment of a client’s capacity. <sup>6</sup> In most cases in which the authority to administer antipsychotic medication is

sought by means of a substituted judgment determination, the expert assistance of a psychiatrist should be sought, and such assistance must be sought whenever such medications are proposed to be administered for the first time to a particular client. After meeting with the client and investigating the facts, as described above in ¶ 4, the attorney shall determine whether expert assistance will be of value and, if so, he or she shall move for funds therefore, pursuant to the Indigent Court Costs Act. G.L. c. 261, §§ 27A-G. See *Guardianship of a Mentally Ill Person*, Mass.App.Ct., No. 85-0018 Civ. (Dreben, J.).<sup>7</sup>

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signed by the client stating the client's understanding of his or her right to seek other counsel for the private case. *CPCS Assigned Counsel Manual*, Part V, § 3(A)(2).

<sup>5</sup> Of particular significance will be information as to treatment and services that are, or can be made, available that will assist the client in "meeting the essential requirements for physical health, safety or self-care," despite his or her alleged disabilities. See definition of "incapacity" at n. 6, below.

<sup>6</sup> The appointment of a guardian, or the authority to administer or withhold "extraordinary treatment," is warranted upon a finding that a client is "incapacitated." An "incapacitated person" is defined as:

an individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

G.L. c. 190B, § 5-101(9).

<sup>7</sup> Sample Motions, Affidavits and other material are available on the Mental Health Litigation Unit's website: [http://www.publiccounsel.net/Practice\\_Areas/Mental\\_Health/practice\\_aids/practice\\_aids\\_motions.html](http://www.publiccounsel.net/Practice_Areas/Mental_Health/practice_aids/practice_aids_motions.html). The decision as to whether to retain the services of a clinician is the attorney's. He or she must, of course, discuss the purpose, parameters and confidential nature of the clinician's examination with the client.

6. Upon allowance of the motion for funds, the attorney shall contact the independent clinician and instruct him or her as to the purpose and parameters of his or her role and responsibilities. To the extent appropriate, the attorney should share with the clinician all pertinent information obtained pursuant to ¶ 4, above. The attorney shall remind the clinician that all information gleaned and opinions formed by the clinician shall remain confidential and may be shared only with the client and the attorney, and that such information and opinions may not be divulged to the court, petitioner, or petitioner's attorney without the permission of the client's attorney.

After the clinician examines the client, reviews the records and speaks with staff and others, as appropriate, he or she and the attorney shall meet to discuss the clinician's findings and opinions. Of particular concern should the clinician opine that the client may indeed be incapacitated to some extent, will be the identification of those areas of decision-making in which the client is not incapacitated and those areas of decision-making in which the client, although perhaps having difficulty, is able to care for him- or herself with assistance, in order that the court may tailor its order to the specific decision-making needs of the client.

The attorney shall determine whether and to what extent the clinician's services shall be of further use. If the clinician will be called to testify at a hearing, the attorney shall fully prepare him or her for direct- and cross-examination.

The attorney also should inform the clinician as to the amount of funds that have been allowed and instruct him or her to refrain from performing any services or incurring any expenses in excess of such amount unless and until a supplemental motion for funds has been allowed.

7. The attorney shall use formal discovery processes if indicated and tactically advisable. The attorney shall confer with potential witnesses, including but not limited to the petitioner, personally or through counsel, treating psychiatrists and psychologists, nursing and any other staff familiar with the client's care and treatment, the prospective guardian, if one has been nominated, and other possible witnesses suggested by the client. The attorney should also confer with other involved parties, for example, family members. Where necessary, witnesses should be subpoenaed. The attorney should meet with the witnesses in advance of the trial in order to prepare them for direct- and cross-examination. The attorney shall review the medical record to identify those parts of the record that may be inadmissible and, therefore, whose admission should be objected to if proffered at trial. The attorney should identify the petitioner's witnesses and make an effort, if tactically indicated, to interview them on the record and prepare cross-examination.

8. The attorney should meet again, and as often as necessary, with the client to discuss the upcoming hearing, and should keep him or her informed of the progress of case preparation. The attorney should inform the client of the witnesses expected to be called and any other evidence he or she intends to present. The attorney also should discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney should thoroughly prepare the client for direct- and cross-examination.

9. The attorney should establish a record of: (a) the nature, type, and extent of the client's specific cognitive and functional abilities and limitations; (b) evaluations of the client's mental and physical condition and, if appropriate, his or her educational potential, adaptive behavior, and social skills; (c) the prognosis for improvement and any available recommendations as to appropriate treatment or habilitation plans; <sup>8</sup> (d) the client's experience, if any, with the specific treatment proposed, including side effects; (e) the client's history of participation in inpatient and outpatient treatment; (f) the relative success of previous treatment plans; (g) the current treatment plan, if any; (h) the client's criminal history, if any; (i) his or her employment record; (j) his or her home and familial situation, and (i) the client's religious beliefs, if they would be pertinent.

10. After reviewing the petition and the pleadings, the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda.

If it appears likely that the client will be found to be incapacitated, the attorney shall negotiate with petitioner's counsel as to the scope of the guardian's authority. If the parties are able to agree on a proposed guardianship order that is appropriately tailored to the specific decision-making needs of the client, the attorney may stipulate thereto at the hearing.

11. Prior to the hearing, the attorney shall (a) prepare any pretrial motions, memoranda, and requests for rulings; (b) prepare consistent direct- and cross-examination questions; and (c) prepare an opening argument. If required or requested by the court, or as otherwise deemed appropriate by the attorney, he or she shall prepare requests for findings of fact and law to be

presented at the close of evidence.

12. During the hearing the attorney shall act as a zealous advocate for the client, insuring that proper procedures are followed and that the client's interests are well represented. To that end, the attorney shall: (a) file any and all appropriate motions and legal memoranda, including but not limited to motions regarding the assertion of privileges and confidential relationships, and the admission, exclusion or limitation of evidence; (b) present and cross-examine witnesses, and provide evidence in support of the client's position; (c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and (d) take any and all other necessary and appropriate actions to advocate for the client's interests.

13. If the court finds the client to be incapacitated, the attorney shall ensure that (i) the court tailors the guardian's authority to the specific decision-making needs of the client,<sup>9</sup> (ii) the guardianship order clearly delineates such limited authority, and (iii) the guardian's obligation to periodically report to the court is noted. If a temporary guardianship order issues, the attorney shall ensure that (i) the temporary guardian's authority is limited to decision-making pertinent to the exigent circumstances that warranted the appointment and (ii) the expiration date of the appointment is specified. Where treatment pursuant to a substituted judgment determination is authorized, the attorney shall ensure that (i) periodic reviews and an expiration date are incorporated into the court's decree, (ii) a treatment plan is approved by the court, and (iii) a monitor is appointed to oversee the implementation of the treatment plan.

14. After the hearing the attorney shall meet with the client to explain the court's decision and, if a guardianship or substituted judgment order has issued, the client's appellate rights. If the client wishes to

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<sup>8</sup> See n. 5, above.

<sup>9</sup> "The court shall exercise [its] authority . . . so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure." G.L. c. 190B, § 5-306(a).

exercise such appellate rights, the attorney shall file a timely notice of appeal with the trial court. Where an appeal is filed, the attorney shall, without delay, notify CPCS's Mental Health Litigation Unit in order that appellate counsel may be assigned.

15. As directed by the Administrative Office of the Probate and Family Court, in guardianship proceedings that do not involve a substituted judgment determination, the attorney's representation shall terminate upon the issuance of the court's decree, unless otherwise ordered by the court. In proceedings in which a substituted judgment determination has been made to authorize treatment, the attorney will continue to represent the client for purposes of periodic reviews and extensions of the substituted judgment order and treatment plan.

16. Whenever counsel's representation continues beyond the issuance of the initial guardianship or substituted judgment order, as described in ¶ 15, counsel is not to assume oversight responsibility for his or her client's ongoing treatment or living arrangements (*e.g.*, the attorney is not expected to attend his or her client's treatment team meetings). That is a monitor's responsibility as to substituted judgment matters and is a guardian's responsibility as to other

issues. Rather, the attorney's role is to advocate on behalf of his or her client in respect to judicial proceedings.

Such proceedings will come about in either of two ways: (i) regularly scheduled periodic reviews and/or extensions of substituted judgment orders, or (ii) petitions or motions for termination or modification of guardianship orders, both of which will require counsel to meet with his or her client, review monitor or guardian reports, review records, review pleadings, etc., as necessary, and in accordance with these standards, to prepare for the impending hearing.

## **I. PERFORMANCE STANDARDS FOR REPRESENTATION OF CLIENTS BY MENTAL HEALTH APPELLATE COUNSEL**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

1. Immediately upon receipt of the assignment of a case to an appellate counsel, appellate counsel shall: (a) file an appearance in the appropriate court; (b) communicate with the client to inform the client of the assignment; and (c) determine whether a stay of a judgment or order of the lower court should be sought pending appeal. In the event a stay should be sought, counsel shall immediately seek one in

accordance with Mass. R. App. Proc. 6. If appellate counsel would like the assistance of a mentor, s/he should request a mentor assignment.

2. Within five days of receipt of the assignment of an appeal, appellate counsel shall determine whether the provisions of Mass. R. App. Proc. 8 and 9(b) and (c) have been complied with, and if they have not, shall immediately take the steps required to comply including filing any necessary motions for extension of time.
3. Within three weeks after the assignment of a case to an appellate counsel, or, in the event that the transcript has not been completed at the time of the assignment, within three weeks after the receipt of the transcript, appellate counsel shall read the entire transcript and review the entire record of the case. Appellate counsel should at this time determine whether the record is accurate and complete and take such steps as may be necessary under Rule 8(c)-(e) to correct any errors. Appellate counsel shall also confer with any mentor assigned and with the Assistant Director of the Division about issues of law that may be raised on the client's appeal. In cases where the Assistant Director identifies the appeal as one raising complex or novel issues, appellate counsel must also submit a draft of his or her brief to the Assistant Director prior to filing. The draft brief should be submitted to the Assistant Director sufficiently in advance of the due date to allow for comment and revisions.
4. Upon receiving notice of the assembly of the record, appellate counsel shall take the steps necessary to ensure the timely docketing of the appeal in accordance with Mass. R. Civ. Proc. 10(a)(1) and (3) and shall, where necessary, file appropriate motions for leave to proceed *in forma pauperis* pursuant to Mass. R. App. Proc. 12 or for payment or waiver of fees and costs, as necessary under G.L. c. 261, §§ 27A through 27G.
5. After reading the transcript, appellate counsel shall confer with the client and with the trial counsel, if appropriate, about the issues which may be raised on the client's appeal. Appellate counsel should pay particular attention to whether a claim as to ineffective assistance of trial counsel may form the basis of an appeal. See, *Care and Protection of Stephen*, 401 Mass. 144 (1987).
6. If at any time the client insists on having briefed on his or her appeal a contention which, in the judgment of the appellate counsel, cannot be supported by any rational argument, the appellate counsel shall (a) immediately inform and consult with the Assistant Director and if the Assistant Director concurs, (b) inform the client of the client's right with respect to such contention pursuant to *Commonwealth v. Moffett*, 383 Mass. 201, 203-209 (1981); (c) supply the client with a copy of the *Moffett*

opinion; and (d) if the client thereafter wishes to invoke his or her *Moffett* rights with respect to such contention, comply in all respects with the guidelines of the *Moffett* case set forth id. at 208-209 and n. 3. *Care and Protection of Valerie*, 403 Mass. 317 (1988).

7. Appellate counsel shall timely file in the appropriate court all motions necessary or advisable to preserve and perfect the client's appellate rights, including, where necessary, motions pursuant to Rule 14(b) of the Massachusetts Rules of Appellate Procedure to enlarge the time for filing the brief on behalf of the client, and motions pursuant to Rule 8 of the Massachusetts Rules of Appellate Procedure to correct or expand the record.
8. Appellate counsel shall keep the client and Assistant Director informed of all significant developments in the client's case. Appellate counsel shall respond in a timely manner to all correspondence from the client, provided that such correspondence is of a reasonable volume and at a reasonable interval. Appellate counsel shall inform the client and Assistant Director of the date, time and place scheduled for oral argument of the appeal as soon as the appellate counsel receives notice thereof from the appellate court.
9. The brief filed by appellate counsel on behalf of the client shall conform in all respects with Rules 16, 18 and 20 of the Massachusetts Rules of Appellate Procedure, and shall be of high quality.
10. Appellate counsel shall transmit to the client and the Assistant Director a copy of the brief filed on the client's behalf, and shall also transmit to the client a copy of the brief for the Commonwealth and copies of all other substantive documents pertaining to the appellate proceedings.
11. Oral argument of the appeal on behalf of the client should not, absent unusual circumstances and with the approval of the client and the Assistant Director, be waived with respect to any case.
12. The appellate counsel shall inform the client by letter of the decision of the appellate court in the client's case on the date the decision is delivered to the appellate counsel and shall transmit to the client and the Assistant Director a copy of the decision.
13. If the decision of the Appellate Division or Appeals Court is adverse to the client, appellate counsel shall promptly inform the client of the client's right pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure to make application to

the Supreme Judicial Court for further appellate review of the case; and, if the client requests that such application be made, the appellate counsel shall prepare and file on the client's behalf such application within the time prescribed by said Rule 27.1.

14. In the event that the client's appeal is unsuccessful, appellate counsel shall have the discretion, upon the request of the client and subject to the approval of the Assistant Director, to seek relief when in the best judgment of the appellate counsel there exists a reasonable likelihood that such relief may be obtained, by appeal or petition in the federal courts.

**J. SUPPLEMENTAL PERFORMANCE STANDARDS  
GOVERNING APPEALS OF CIVIL COMMITMENT  
MATTERS PURSUANT TO G.L. C. 123, § 9(a)**

Unlike appeals in Probate Court cases, appeals in civil commitment cases go to the Appellate Division of the District Court or the Appellate Division of the Boston Municipal Court. Appeals to the Appellate Division of the District Court or the Appellate Division of the Boston Municipal Court are governed by the District/Municipal Courts Rules for Appellate Division Appeal. These rules are similar to the Rules of Appellate Procedure but are different in some very significant ways. Therefore, attorneys appointed to represent clients in civil commitment appeals must be fully familiar with the District/Municipal Courts Rules for Appellate Division Appeal. The following additions to the Standards for Mental Health Appeals is not intended to be exhaustive or to replace the preceding standards for Mental Health Appeals.

**Supp. Std 1.** Immediately upon receipt of the assignment, appellate counsel shall (a) verify that a notice of appeal has been filed and served; (b) verify that a motion to waive the filing fee has been filed; and (c) determine whether the recording of the proceeding that is the subject of the appeal has been ordered. If not, appellate counsel shall order the recording. If any extensions of time are needed in order to protect the client's rights and prosecute the appeal, appellate counsel shall immediately file the necessary motions.

**Supp. Std 2.** Within ten days of the filing of the Notice of Appeal, appellate counsel shall decide whether the method of appeal will be under Rule 8A, Rule 8B, or Rule 8C of the District/Municipal Courts Rules for Appellate Division Appeal. All documents required under the selected method of appeal shall be filed and served timely.

**Supp. Std. 3.** The brief filed by appellate counsel on behalf of the client shall conform in all respects with Rules 16, 18, and 20 of the District/Municipal Courts Rules for Appellate Division Appeal.

**Supp. Std 4.** If the decision of the Appellate Division is adverse to the client, appellate counsel shall promptly inform the client of the right to appeal to the Appeals Court, if appellate counsel can locate the client.

**K. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CLIENTS IN INVOLUNTARY ADMISSIONS UNDER G.L. C. 123, § 12(b)**

These standards describe the steps which assigned counsel must follow, at a minimum, when representing a client who has been involuntarily hospitalized in a mental health facility or hospital for evaluation for up to three (3) business days pursuant to G.L. c. 123, § 12(b). They are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

15. The role of assigned counsel in representing a client pursuant to an involuntary 3-day hospitalization under G.L. c. 123, § 12(b) is variable, depending on whether the matter results in a request for an emergency hearing or consists of an investigation and client counseling only. At a minimum, counsel shall both inform the client of his or her rights under G.L. c. 123, including, but not limited to, rights under G.L. c. 123, § 12 (involuntary 3-day hospitalization), G.L. c. 123, §§ 10 & 11 (conditional voluntary admission and 3-day notice), and G.L. c. 123, §§ 7 & 8 (involuntary commitment petition and criteria) and shall investigate whether there have been any abuses or misuses of the admission process under G.L. c. 123, § 12(b). Where warranted by the investigation and client's goals for the representation, the role of counsel is to promptly file a Request for Emergency Hearing and Relief in the District Court.

16. Immediately upon receipt of the 12(b) assignment, the attorney shall: (a) contact the facility to request copies of the client's legal file including, but not limited to, copies of the § 12(a) and 12(b) documentation, any § 10 and 11 Applications for Care and Treatment on a Conditional Voluntary Basis (whether or not executed or accepted) as well as any other admission and emergency department documentation, including a crisis team report

or medical records; (b) communicate with the client to inform him or her of the assignment; and (c) meet with the client no later than 24 hours after receiving the assignment, unless the attorney is specifically requested by the CPCS Mental Health Litigation Division to meet with the client the same day, due to the potential for an emergency hearing.

17. The attorney shall meet with the client as soon as possible, but in no event later than the next business day following the assignment. If the assignment is specifically made for the purpose of filing a request for an emergency hearing and relief on behalf of the client, or as a result of the client having previously filed a request for emergency hearing, counsel shall meet with the client the same day of the assignment, or the following morning if the assignment is made after 4:00 p.m.

If, after reviewing the record and meeting with the client, the attorney concludes that there are no grounds for requesting an emergency hearing under G.L. c. 123, § 12(b) (see par. 4 below), the attorney shall explain to the client : (a) the involuntary hospitalization criteria and procedures as well as the hospital's obligations under G.L. c. 123, § 12(b); (b) the client's rights under G.L. c. 123, §§ 10 & 11, including the effects of a signing a conditional voluntary admission and the 3-day notice provision, and (c) the client's rights under G.L. c. 123, §§ 7 & 8, including the right to counsel and an Independent Medical Examiner. With the client's permission, the attorney should also attempt to speak with the client's treating clinician and social worker to see whether a discharge can be worked out.

Unless time does not permit it, the attorney should be prepared to come to the initial meeting with several copies of the Notice of Appointment (NAC), several blank releases to obtain copies of the client's legal/medical record (in the event the facility does not accept the NAC), and copies of the relevant statutes to give to the client.

18. The attorney shall in all instances thoroughly investigate the facts to determine whether there exist grounds for an emergency hearing pursuant to G.L. c. 123, § 12(b). These grounds include: the facility's failure to advise the client of his right to request counsel upon admission; the facility's failure to notify CPCS of the client's desire to have counsel assigned; CPCS' failure to assign counsel and/or assigned counsel's failure to meet with the client; a psychiatric examination which was not conducted by a designated physician; a psychiatric examination was not conducted within 2 hours of the person's reception at the facility; and/or admission to the locked psychiatric unit that was the result of an abuse or misuse of the admission procedure under G.L. c. 123, § 12.

This investigation shall include, at a minimum: (a) a review of the client's legal chart and any crisis team report or other emergency department documents which the

attorney may be able to access; (b) a review of the client's medical record; and (c) an interview with the hospital staff, including the doctors, nurses, and social workers. In appropriate circumstances, the attorney may need to speak with third parties who may be able to serve as witnesses at an emergency hearing. However, since the focus of a G.L. c. 123, § 12(b) emergency hearing is largely procedural rather than substantive in nature, contact with third parties will typically not be part of the attorney's preparation for an emergency hearing.

19. If the attorney determines that the client's admission to the hospital or facility under G.L. c. 123, § 12(b) was defective, the attorney shall promptly file with the District Court: (a) a Request for Emergency Hearing and Relief using the requisite form, asking that the Court order the client's immediate and actual discharge; (b) a Motion to Transport Respondent to Courthouse; (c) a Proposed Order and, if time permits, (d) a supporting memorandum of law. If the client has already filed a Request for Emergency Hearing and Relief, the attorney may file a supplemental or amended request, as necessary. The attorney must promptly send to hospital counsel by fax and/or email a copy of any pleadings he or she has filed with the court, as well as a notice of hearing. Since the court is obligated by statute to hold an emergency hearing on the day upon which the request is filed, and in no event later than the next business day, the attorney must insure the client's right to an immediate hearing in accordance with the statute and case law. *See* G.L. c. 123, § 12(b); *Newton-Wellesley Hospital v. Magrini*, 451 Mass. 777, 785 (2008). If the court refuses to schedule an emergency hearing or denies the relief requested without scheduling a hearing, the attorney shall inform the CPCS Mental Health Litigation Division immediately to discuss a possible Petition for Relief pursuant to G.L. 211, § 3.
20. At the emergency hearing, the attorney shall act as a zealous advocate for the client, ensuring that the proper procedures are followed, and the client's interests are well represented. The client has the right to be present at the hearing. *Newton-Wellesley Hospital v. Magrini, supra* at 785. Thus, the attorney should file a motion requesting an order of transportation along with the request for an emergency hearing to ensure that the client will have the ability to attend the hearing on short notice. While the client is entitled to attend the hearing, the client does not have the right to give testimony. Rather, the decision as to whether the hearing is an evidentiary one is fully within the court's discretion. *Newton-Wellesley Hospital v. Magrini, supra* at 785.
21. After the emergency hearing, the attorney shall meet with the client to explain the court's decision. If the Request for Emergency Relief is allowed and the Court orders the client's discharge, counsel shall make every effort to stay with the client until he or

she is actually discharged, in order to avoid the possibility that the client will only be “administratively” discharged and readmitted under a new section 12, despite the order for discharge.

If the court denies the Request for Emergency Relief, the attorney shall explain to the client that the facility has legal authority to continue to hold him or her for the remainder of the three-day involuntary hospitalization under § 12(b), and that at any time during this period the facility may file a civil commitment petition under §§ 7 & 8 instead of discharging him or her. Counsel shall also explain to the client that if the facility files a petition for commitment, it will have the legal authority to hold the client further detain the client during the pendency of the commitment proceeding. The attorney shall also explain to the client generally the procedure for a civil commitment petition and his or her right to counsel and an Independent Medical Examination, as well as review with him or her alternatives to commitment, including signing an application for care and treatment on a conditional voluntary basis under §§ 10 & 11.

The attorney shall advise the client that her representation is concluded either after the initial consultation or following the decision by the court on any request for emergency relief.

#### **L. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF INDIGENT PERSONS IN TRIALS OF SEXUALLY DANGEROUS PERSON CIVIL COMMITMENTS**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Assigned counsel must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures.

Specifically, these standards describe what is minimally expected of an attorney who is assigned by the Alternative Commitment and Registration Support Unit (the Unit) or by the Public Defender Division of CPCS to represent a person subject to initial commitment as a sexually dangerous person (SDP) under section 12 or section 15 of G.L. c. 123A or to represent a person petitioning for release from commitment under section 9 of G.L. c. 123A.

All of the following standards are applicable to section 9, 12 and 15 proceedings unless specifically noted.

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## 1. GENERAL DUTIES OF COUNSEL

### Standard 1

The following General Principles of Representation from the Performance Standards Governing Representation of Clients in Criminal Trial Cases of the Assigned Counsel Manual, [Chapter 4, Section B\(1\)](#), are incorporated by reference: [c\(i\)](#), [c\(iv\)](#), [c\(v\)](#), [c\(vi\)](#), [c\(vii\)](#), [c\(viii\)](#), [c\(ix\)](#), [c\(x\)](#), [c\(xi\)](#), [c\(xii\)](#), [c\(xiii\)](#), [c\(xiv\)](#) and [c\(xvi\)](#).

In addition to the above General Principles, counsel must adhere to the requirements of the CPCS Assigned Counsel Manual including those set out in [Chapter 2](#) (General Policies Applicable to All Assigned Counsel).

## 2. PREPARATION OF CASE

### Standard 2

The role of the attorney in a SDP commitment is to act as an advocate for the client, and to ensure that the client is afforded all of his or her rights.

Throughout the representation of the client, the attorney shall act as a zealous advocate for the client, ensuring that the proper procedures are followed and that the client's interests are well represented.

### Standard 3

Counsel must be familiar with all provisions of the Statute governing sexually dangerous persons, G.L. c. 123A, the rules of evidence governing these proceedings, the rules of civil procedure, and the body of case law applicable to these proceedings.

### Standard 4

Counsel must be familiar with the current scientific literature regarding sexual disorders, psychological diagnoses, sex offender recidivism, treatment, and the relevant risk assessment tools.

### Standard 5

Resource attorneys (RA)/mentors shall be assigned to counsel new to the SDP trial panel. Counsel is expected to work with a resource attorney for as long as required by CPCS, but at least for the first § 9 and § 12 trial assignments. An attorney accepted onto the SDP trial panel is provisionally accepted contingent upon successful completion of the required number of SDP cases with a resource attorney.

If trial counsel would like the assistance of a resource attorney for any reason, s/he should request an assignment from the Unit.

Counsel shall confer with his/her resource attorney about issues of fact and/or law that arise during the preparation of the case. In addition, counsel should consult the RA at all stages of representation, as detailed in the letter sent to new counsel upon assignment of a RA, including, but not limited to client interviews, independent experts, qualified examiner interviews and reports, discovery, investigation, and trial strategy. Prior to filing, counsel is expected to present to the RA all written submissions such as motions, memoranda, and proposed jury instructions.

If counsel is assigned a case that counsel or the RA feel is too difficult for the level of experience, counsel must call the Unit to discuss reassignment of the case.

### Standard 6

Immediately upon receipt of the assignment of a case the attorney shall: (a) file an appearance in court; (b) communicate with the client by mail, telephone or in person within three days of receiving the assignment to inform the client of the assignment and the date on which counsel will visit the client; (c) arrange to meet with the client in accordance with Standard 7, and (d) promptly begin work on the case. If the attorney's schedule does not permit him/her to fulfill these requirements, the attorney shall decline the assignment absent special arrangements with the Unit.

### Standard 7

In proceedings under § 12, the attorney shall meet with the client at the prison where he is confined or at the Nemasket Correctional Center (Treatment Center or MTC), within three business days of assignment. In those instances when it will not be possible for counsel to see a § 12 client within that time frame, the attorney must write to the client within three business days informing him of the assignment and indicating a date on which counsel will visit. Under any circumstances, an initial visit to an in-custody § 12 client must occur no later than one week from the date of assignment and in advance of the date of the probable cause hearing.

In proceedings under § 9, the attorney shall meet with the client within 30 days of assignment.

The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, to explain the law and procedures to the client, to determine the client's version of the pertinent facts, and to determine the client's wishes regarding the litigation. The attorney should seek to obtain from his/her client written authorization to examine the client's Department of Correction (DOC), medical, and treatment records or, where the client is unable or unwilling to provide such authorization, a court order authorizing such examination.

Finally, the attorney shall inform the client of his/her right to independent examinations, and shall discuss hiring independent examiners at the expense of the Commonwealth.

As part of the pre-trial or pre-probable cause preparation, counsel shall collect all of the client's relevant prior statements and, use them to prepare the client for interviews with state and independent psychologists. Counsel shall work with the client as if counsel were preparing him for a deposition.

After developing a thorough knowledge of the law and facts of the case, the attorney shall meet again with his/her client for the purpose of discussing trial strategy.

Standard 8

Counsel shall keep the client informed of all significant developments in the client's case. Counsel shall respond in a timely manner to all correspondence from the client, provided that such correspondence is of a reasonable volume and at a reasonable interval.

Standard 9

Counsel is expected to accept (and can bill for) a reasonable number of collect telephone calls. The vast majority of client complaints involve difficulty communicating with counsel. If counsel is often not available, counsel's office should accept the calls and arrange a time when counsel will be able to talk to the client and/or send the client a letter indicating dates and times when counsel will be available to accept calls. Counsel is expected to be available to speak with the client by phone at least once every two weeks.

Standard 10

If either a conflict arises or the communication with the client irretrievably breaks down and counsel needs to have the case reassigned, counsel should contact the Unit before filing any motion to withdraw.

Standard 11

Counsel shall comply with all deadlines set by the Court. Counsel shall not agree to a continuance of the trial or hearing absent good cause and without first consulting with the client and obtaining his/her express agreement.

Standard 12

The attorney shall thoroughly investigate the facts of the case. This investigation shall include making an appointment to read all records at the MTC and copying relevant documents, reading the complete DOC and Commonwealth records, including police reports and all other records from the client's past criminal offenses, and interviewing institutional staff at DOC facilities, including the Treatment Center, prior therapists or other evaluators or treatment providers, family members, friends, and other persons who might provide evidence about the client.

The attorney may file a motion with the trial court requesting funds to hire an investigator or other professional to assist with these tasks.

Counsel is expected to commence gathering this information well in advance of trial to allow for scheduling and other delays.

#### Standard 13

Prior to the client's trial or actual release, the attorney shall inquire whether the client has been classified by the Sex Offender Registry Board (SORB) and, if so, whether procedures have been followed pursuant to *Doe No. 7083 v. SORB*, 472 Mass. 475, 489-490 (2015). Not less than six months prior to the trial date, counsel shall file a motion to re-open the SORB hearing, if indicated, and shall contact the Unit for appointment of SORB counsel.

### **3. EXPERTS (INDEPENDENT EXAMINERS, QUALIFIED EXAMINERS AND COMMONWEALTH EXAMINERS)**

#### Standard 14

The attorney shall file a motion for funds for an independent examination as soon as practicable.

After discovery and upon the allowance of the motion for funds, the attorney shall retain the services of one or more capable independent forensic or clinical examiners in sufficient time for them to prepare for and testify at trial, if they opine not SDP. The attorney shall make a determination, based upon the circumstances of the particular case, as to which independent examiners likely would be of most assistance to the attorney and client. In section 9 cases, experts should be retained four to six months in advance of the trial date.

The attorney shall communicate with the independent examiner in order to educate him or herself and develop a theory of the case. The attorney shall prepare the independent examiner for trial, including providing the examiner with copies of documents from the client's MTC file as needed, and shall keep the expert apprised of any scheduling changes.

### Standard 15

The attorney shall inform retained experts in writing, and obtain their written agreement prior to retainer, that their reports, and any information gleaned in the process of conducting their examinations, are the property of the client and should be sent or divulged only to the attorney, and that the report is not to be filed with the court or disclosed to the Commonwealth or any other person without the permission of the attorney. See *Commonwealth v. Thompson*, 386 Mass. 811, 819 (1982).

The attorney shall ensure that the examiner understands the purpose and scope of the evaluation. S/he shall explain the requirements of the sexually dangerous person statute to the examiner and shall ensure that the examiner understands the legal standards applicable to the proceeding.

### Standard 16

The attorney shall provide informed advice to the client as to whether, and if so when, the client should participate in any evaluations sought to be conducted by the Commonwealth's experts, the Community Access Board, or by the qualified examiners. See G.L. c. 123A, section 9 (If client "refuses, *without good cause*, to be personally interviewed by a qualified examiner appointed pursuant to this section, such person shall be deemed to have waived his right to a hearing on the petition and the petition shall be dismissed upon motion filed by the commonwealth" (emphasis added)); See also *Commonwealth v. Connors*, 447 Mass. 313 (2006) (Respondent may not offer his own expert's testimony based, in part, upon information gained during a personal interview unless he also submits to interviews with the qualified examiners); *Commonwealth v. Poissant*, 443 Mass. 558 (2003) (Respondent, in a § 12 case, after participating in two evaluations by qualified examiners, does not have to submit to additional examination by Commonwealth's retained expert and this will not bar him from presenting his own expert testimony at trial).

While there is no right to have counsel present at qualified examiner interviews, *Commonwealth v. Sargent*, 449 Mass. 576 (2007), the attorney shall move to be present during interviews with qualified examiners or to have the interviews audio/videotaped if such action would benefit the client. But see, *Commonwealth v. Ferreira*, 67 Mass. App. Ct. 109,116 (2006).

Counsel shall ensure that the client understands the interview process and what to expect during the interview and evaluation by the Commonwealth's experts, the

Qualified Examiners or the Community Access Board. Counsel must be aware of and able to advise the client regarding the client's prior statements.

#### 4. DISCOVERY AND MOTIONS

##### Standard 17

As necessary, the attorney shall use formal discovery mechanisms to the extent permitted by the trial court. The attorney shall subpoena all of the Commonwealth's files regarding the client.

Counsel should explore the options of using the civil discovery tools, i.e., requests for production of documents, interrogatories, requests for admissions and depositions. See G.L. c. 231, sections 61-68 (allows for interrogatories and document inspection in cases not governed by civil rules of procedure) and G.L. c. 231, section 69 (allows for demand for admissions); See also Mass. R. Civ. P. 81(a)(3) (Massachusetts rules of civil procedure do not apply to these proceedings, however, discovery may be propounded by order of the court on motion with notice and for good cause shown); *Sheridan, Petitioner*, 422 Mass. 776, 777, n. 3 (1996) citing *Commonwealth v. Pimental*, 362 Mass. 854 (1972) (interrogatories and depositions are allowed in c. 123A proceedings).

Discovery should be provided to opposing counsel in advance of trial as required by statute or court scheduling order.

##### Standard 18

After reviewing the discovery including DOC and medical records, QE reports, and the Commonwealth's pleadings the attorney shall determine if any procedural defenses or objections can be raised and, if warranted, file appropriate motions with supporting memoranda.

Counsel should file all appropriate motions including, but not limited to, the following:

- A. Motion to exclude or limit Commonwealth's expert witnesses' opinions, reports, or use of certain risk assessment tools or methodology concerning the client's risk of reoffense and/or other conclusions as unreliable pursuant to *Commonwealth v. Lanigan*, 419 Mass. 15, 24-27 (1994). See *Commonwealth v. Ready*, 63 Mass. App. Ct. 171 (2005) (Abel Assessment tool does not meet Daubert-Lanigan standard for admissibility in any proceeding pursuant to c. 123A); Contrast *Commonwealth v. Bradway*, 62 Mass. App. Ct. 280 (2004)

(Daubert-Lanigan hearing is not required prior to the admission of the qualified examiner's expert opinion testimony).

- B. Motions to exclude Qualified Examiner's testimony based on lack of statutorily required experience pursuant to *LeSage, Petitioner*, 76 Mass. App. Ct. 566 (2010) (QE did not meet statutory requirement of 2 or more years of experience with diagnosis or treatment of sexually aggressive offenders, and allowing her to testify constituted abuse of judicial discretion).
  
- C. Motions in limine to exclude or redact any report, document or testimony that is irrelevant, privileged, unreliable or unduly prejudicial. *See Commonwealth v. Markvart*, 437 Mass. 331, 339 (2002) (Qualified examiner's report must be redacted prior to its submission to the jury to exclude any facts or data that were not presented in evidence); *Commonwealth v. Callahan*, 440 Mass. 436 (2003) (Court cannot authorize production of privileged documents, i.e., DSS, DYS, psychiatric hospital records, from third parties); *Commonwealth v. Hunt*, 462 Mass. 807 (2012) (Evidence of petitioner's refusal of treatment should be excluded); *Commonwealth v. Morales*, 60 Mass. App. Ct. 728 (2004) (separate hearsay exception for totem pole hearsay is required if evidence is admitted under "catch-all" phrase of section 14(c)); *Commonwealth v. Markvart*, 437 Mass. at 335-336 (police reports and witness statements from cases in which charges have been dismissed or nolle prossed or in which defendant was found not guilty are not directly admissible); But see *Commonwealth v. Given*, 441 Mass. 741, 745, 746, n.6 (2004) (Evidence of uncharged conduct is admissible only when it is closely related in time and circumstances to the underlying sexual offense).

If motions to exclude testimony or documentary evidence are denied, the attorney shall renew objections to all such testimony when offered at trial or hearing. *See Commonwealth v. DiGiacomo*, 57 Mass. App. Ct. 312, 323 (2003).

## **5. CONDUCT OF TRIALS**

### Standard 19

Prior to trial, the attorney shall identify and subpoena potential witnesses who will testify in support of the client. The attorney shall meet with the witnesses in advance of trial in order to prepare them for direct and cross-examination.

The attorney shall review the record and identify those parts of the record which should and should not be admitted into evidence. The attorney shall determine the identity of the Commonwealth's witnesses in advance of trial, and shall attempt to interview them. The attorney shall prepare appropriate cross-examination.

#### Standard 20

The attorney shall thoroughly and carefully counsel the client about the pros and cons of the client testifying. The attorney shall consider conducting or engaging another attorney to conduct a mock cross-examination of the client in order to help the client understand the risks involved in testifying. If the client wishes to testify, the attorney shall thoroughly prepare the client for direct and cross-examination.

#### Standard 21

In all proceedings the attorney shall prepare for trial on the presumption that the case will be tried to a jury. See G.L. c.123A, § 9 and 14(a) (either party may demand a jury trial).

#### Standard 22

The attorney shall write a statement of the case to be read to the jury panel before the voir dire and shall move for the use of a sex offender specific juror questionnaire and attorney-led individual voir dire of all members of the jury panel.

#### Standard 23

The attorney shall file a motion to dismiss, motion for directed verdict and a motion for judgment notwithstanding the verdict in all appropriate circumstances.

In any case where both qualifying examiners find the client not sexually dangerous, the attorney must file a motion to dismiss the petition in a section 12 case and a motion to dismiss and for immediate release in a section 9 case. See *In Re Johnstone*, 453 Mass. 544 (2009) (Commonwealth cannot go forward unless at least one qualified examiner opines that individual is sexually dangerous).

#### Standard 24

The attorney shall make appropriate objections and preserve issues for appeal.

Standard 25

The attorney shall prepare and file proposed jury instructions. In a jury waived trial, the attorney shall file Proposed Findings of Fact and Rulings of Law.

**6. POST-TRIAL**

Standard 26

Following trial, the attorney shall meet with the client to explain the court's decision. If the client is committed or ordered to remain at the Treatment Center, the attorney shall explain the client's right to appeal.

Standard 27

Absent specific and knowing instructions from the client to the contrary, attorneys are REQUIRED to file a timely notice of appeal and to take whatever steps are necessary in the trial court to perfect the appeal of an adverse judgment.

Those steps include:

- A. The attorney shall file a timely notice of appeal in the Superior Court clerk's office within 60 days of the entry of the judgment. M.R.A.P. 3, 4.
- B. The attorney shall serve a copy of the notice of appeal on the opposing attorney.
- C. Counsel shall move for funds to obtain transcripts from the court reporter and shall provide notice of the transcript order to opposing counsel. M.R.A.P. 8(b)(1).
- D. Transcripts must also be filed with the Superior Court civil clerk within a particular time frame. See M.R.A.P. 9(c)(2).

Standard 28

Trial counsel shall promptly inform the Assignment Coordinator of the Alternative Commitment and Registration Support Unit of the Committee for Public Counsel Services of the notice of appeal in order that appellate counsel may be assigned. Counsel must send a completed appellate referral form to the Assignment Coordinator within 14 days of the filing of a notice of appeal.

The attorney shall cooperate fully with appellate counsel, which includes providing appellate counsel with a copy of the trial file within 14 days of a request.

### Standard 29

If at the conclusion of trial, the trier of fact finds that the client is sexually dangerous, the attorney shall assist the client in filing a § 9 petition for examination and discharge in the county where the § 12 case was tried. Counsel is responsible to follow-up to ensure that the petition has been docketed and transferred from the county in which it was filed to the Unified Session in Boston. Counsel shall not withdraw from the case until s/he is assured that the client's section 9 petition has reached the Unified Session in Boston. Copies of all § 9 petitions must be sent to the Department of Correction counsel and the Attorney General pursuant to G.L. c.123A, § 9, as well as to the client. A courtesy copy may be sent to the Unified Session in Boston.

## **7. BILLING**

### Standard 30

Counsel is responsible for familiarizing him/herself with all billing policies as set forth in the CPCS Assigned Counsel Manual available at [www.publiccounsel.net](http://www.publiccounsel.net).

## **8. STANDARDS SPECIFIC TO SECTION 12 TRIALS**

### Standard 31

Counsel shall consider filing a Motion for Release from Temporary Commitment pursuant to G.L. c. 123A, § 12(e) prior to the probable cause determination whenever a temporary commitment order prevents the client's release from custody following the expiration of his/her underlying sentence.

## **9. SECTION 12 PROBABLE CAUSE HEARING**

### Standard 32

Counsel should advise the client to waive his right to a probable cause hearing within ten days if this delay allows the client to better prepare for interviews with the Commonwealth experts. Because a finding of not sexually dangerous by two qualified examiners would result in release, the client benefits from thorough preparation before interviewing with these experts.

Upon consultation with the client, the attorney may waive the probable cause hearing if the client agrees and if compelling strategic reasons support such a decision.

In all other circumstances, the attorney shall proceed with a probable cause hearing within ten days.

In the appropriate case, counsel should consider arranging a client interview with the initial pre-probable cause expert for the Commonwealth and/or submitting additional information to that expert.

#### Standard 33

If expert testimony is in the best interests of the client, the attorney shall file a motion for funds and retain the services of an expert for the probable cause hearing in accordance with Standards [14](#) and [15](#).

#### Standard 34

The attorney shall request transcripts of the probable cause hearing if needed for trial preparation.

#### Standard 35

Upon a finding of probable cause, the attorney shall move for funds sufficient to retain the services of at least two independent forensic or clinical experts to evaluate the client, to assess the conclusions of the Commonwealth's experts and the reliability and foundation thereof, to otherwise assist counsel in preparation for trial, and to testify at trial. The attorney shall otherwise follow the Standards [14-16](#) regarding expert witnesses. In addition, counsel should consider whether other experts, such as a physician, neurologist, or other specialist could be helpful to the particular client's case.

### **10. SECTION 12 PROCEDURAL MOTIONS**

#### Standard 36

Counsel should file all appropriate motions and raise procedural defenses, including but not limited to the following:

- A. The Respondent is not a prisoner because he (i) completed his sentence before the Commonwealth's petition was filed, *Commonwealth v. Allen*, 73 Mass. App. Ct. 862 (2009); (ii) is held due to a G.L. c. 123 mental health commitment order, *Commonwealth v. Gillis*, 448 Mass. 354 (2007); (iii) is held on bail awaiting trial without a judicial finding of incompetency *Commonwealth v. Libby*, 472 Mass.

93 (2015); or is illegally held at the time the petition was filed, *Gangi v. Parole Board*, 468 Mass. 323 (2014); *Coffin v. MTC*, 458 Mass. 186 (2010).

- B. The Commonwealth failed to provide expert evidence required for temporary commitment. See *Commonwealth v. Bruno*, 432 Mass. 489 (2000).
- C. The Court failed to schedule a timely probable cause hearing within 10 days of order of temporary commitment. See G.L. c. 123A, sections 12(c) and (e); *Commonwealth v. Bruno*, 432 Mass. 489, 513 (2000).
- D. The Commonwealth failed to petition for trial within 14 days of the filing of the qualified examiners' reports. *Commonwealth v. Gross*, 447 Mass. 691 (2006) (Commonwealth must file a distinct petition for trial after qualified examiner reports are filed; request for trial in original petition or before reports are filed is insufficient); *Commonwealth v. Gagnon*, 439 Mass. 826 (2003); *Commonwealth v. Kennedy*, 435 Mass. 527 (2001).
- E. The Commonwealth failed to bring the respondent to trial within sixty days of the conclusion of the probable cause hearing. See *Commonwealth v. Gangi*, 462 Mass. 158 (2012).
- F. Qualifying Examiner reports are filed beyond the 60 day period and result in respondent's confinement beyond sixty days in violation of G.L. c. 123A, § 13A. *Commonwealth v. Parra*, 445 Mass. 262 (2005).
- G. Commonwealth petitions against a juvenile while he is illegally held by the Department of Youth Services (DYS) beyond his eighteenth birthday. *Kenniston v. DYS*, 453 Mass. 179 (2009); *Commonwealth v. Gillis*, 448 Mass. 354, 358-359 (2007); *Commonwealth v. Allen*, 73 Mass. App. Ct. 862 (2009) (petitions filed against individuals who are not lawfully detained are invalid and must be dismissed).

## 11. STANDARDS SPECIFIC TO SECTION 9 TRIALS

### **Standard 37**

The attorney shall move the court for a speedy hearing on statutory and constitutional grounds.

## 12. STANDARDS SPECIFIC TO SECTION 15 TRIALS

### Standard 38

All standards for section 12 trials except for provisions regarding juries also apply to section 15 trials.

### Standard 39

Counsel shall familiarize him/herself with the rules of evidence applicable in criminal cases and all rights available in criminal cases, as they are applicable to these trials, except for right not to be tried while incompetent and right to trial by jury which do not apply to section 15 trials.

## **M. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CLIENTS IN SEX OFFENDER REGISTRY BOARD PROCEEDINGS**

These guidelines are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these guidelines and the Massachusetts Rules of Professional Conduct. In evaluating the performance of counsel, the Committee for Public Counsel Services will apply these guidelines and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in the Assigned Counsel manual and other CPCS publications.

Assigned counsel should note that these guidelines refer to, and assume that counsel is familiar with the MCLE training materials, including the book *Sex Offender Registry Practice*, which are provided to counsel as part of the certification training. Many pleadings mentioned in these standards are contained in the training materials.

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## **1. GENERAL PRINCIPLES OF REPRESENTATION**

### **1.1 The Role of Counsel**

Counsel's goal in representing a client in a matter pertaining to the Sex Offender Registration and Notification Act ("the Act"), G.L. c. 6, §§ 178C-P, is to try to obtain a ruling that the client does not have to register under the Act, or that he is not subject to the notification provisions of the Act, or at least that the client receives the lowest risk level classification possible. Counsel's goal is also to preserve all of the client's constitutional and other challenges to the Act so that the client may receive the benefit of any future favorable opinions from appellate courts.

The Supreme Judicial Court has held that former sex offenders are entitled to the effective assistance of counsel at Sex Offender Registry Board (SORB) proceedings and that the civil formulation of the Saferian standard applies to such claims. *Poe v. Sex Offender Registry Board*, 456 Mass. 801, 811 (2010).

### **1.2 Education, Training and Experience of Defense Counsel**

- a. Counsel should familiarize himself/herself with the Act, with the Sex Offender Registry Board (SORB) regulations, Massachusetts case law on the subject of the sex offender registry, and relevant scholarly articles on sex offender recidivism. Counsel should familiarize himself/herself with the Rules of Civil Procedure and the Superior Court Rules which apply to superior court civil actions challenging the SORB's risk level classification. Counsel are expected to keep abreast of new legal developments and cases governing the sex offender registry law.
- b. Any attorney assigned a mentor/resource attorney shall diligently work with the mentor and follow all required guidelines such as those listed in the letter received by a mentee upon the assignment of a mentor.
- c. An attorney accepted onto the CPCS SORB panel is provisionally accepted contingent upon successful completion of the SORB Certification Training and of several SORB cases with the supervision of a mentor.

### **1.3 General Duties of Counsel**

- a. The following General Duties of Defense Counsel from the Performance Standards Governing Representation of Clients in Criminal Trial Cases, [Chapter 4\(B\)\(1\)\(a\)](#) and [\(1\)\(c\)](#) are incorporated by reference.

## 1.4 Counsel Response to Complaint Letter

- a. Counsel must respond in a timely and complete manner to any complaint letter or inquiry sent by CPCS oversight staff. See Assigned Counsel Manual, Chapter 8, [Complaints Regarding Performance and Conduct of Assigned Counsel](#).

## 2. PRELIMINARY PROCEEDINGS & PREPARATION

### 2.1 Receipt of Assignment

- a. Upon receipt of a Notice of Assignment of Counsel (NAC), counsel should immediately contact the client as required in [section 2.2](#).
- b. If counsel receives a NAC and cannot accept the assignment, counsel must contact the CPCS Assignment Coordinator by telephone, email or letter within two business days.
- c. After counsel has spoken to the client in depth as described in [section 2.2](#), counsel should contact the SORB to schedule a hearing date and to arrange for the SORB to send counsel discovery materials. Counsel may delay scheduling a hearing date if, in the circumstances of the case, counsel determines that this delay would benefit the client by allowing additional time for counsel to have the client evaluated by an expert, to have the client begin treatment, or to otherwise prepare the case. Counsel should make every effort to ascertain the client's and witnesses' schedules before scheduling a hearing date with the SORB.
- d. If the client is incarcerated, in custody, or civilly committed, counsel must move to continue the final classification hearing to a date that is reasonably close to the client's actual release date.
- e. If the client has a final SORB classification hearing scheduled on a date reasonably close to the client's *possible* release date (e.g., dependent upon the result of a sexually dangerous persons trial or parole hearing), counsel must move to keep the case open until such time as the client is actually released from custody. If the client is not released, counsel must move for a new hearing to admit updated information at a later date that is reasonably close to the client's next possible release date.
- f. If the client is incarcerated, in custody, or civilly committed and has been finally classified by SORB one year or more prior to his actual release date, counsel must

move to vacate the stale classification and request a new hearing on a date that is reasonably close to the client's actual release date.

## **2.2 Contacting the Client**

- a. Counsel must make every effort to speak with the client, in person or by telephone, within three business days of receipt of the NAC. Counsel should explain to the client the SORB classification and hearing procedures and, if this initial contact is by phone, arrange for a follow-up meeting with the client in person.
- b. Counsel must arrange for consultation with the client, in person, in an appropriate and private setting, within ten business days of receiving the assignment letter from CPCS. Counsel should be aware that it is a criminal offense for the client to reside, work, or attend a post-secondary educational institution at an address other than the addresses at which the client has registered, and advise the client accordingly.
- c. If the client does not speak English, counsel must immediately secure the services of an interpreter to assist with the client interview, if needed.
- d. If at any time during representation of the client, counsel's ability to prepare the case is substantially affected by his inability to contact the client, counsel must contact the CPCS Alternative Commitment and Registration Support Unit for advice.
- e. At the initial meeting, counsel should carefully question the client about his prior criminal record, and determine, by reviewing the Court docket, whether the client has been convicted of one of the sex offenses designated in § 178C of the Act. If the client's sex offense conviction is out of state, counsel should determine whether an argument can be made that it is not a like offense to an enumerated offense in § 178C. Once counsel has obtained the client's CORI in the initial discovery packet from the SORB, counsel should verify that the information obtained from the client is accurate. In the event that the client has erroneously registered as an offender, counsel must contact the SORB and take steps to remove the client's name from the registry.
- f. Counsel should discuss with the client the client's conviction(s) for sex offenses and determine whether it is possible to mount a collateral attack on the conviction(s), in order to relieve the client of the duty to register. If a collateral

attack seems appropriate, counsel must contact the Alternative Commitment and Registration Support Unit at CPCS about either obtaining assistance in collaterally attacking the conviction or having this issue assigned to other counsel.

- g. Counsel should determine whether the client has been the subject of a sexually dangerous person civil commitment proceeding and, if so, contact the attorney who most recently represented the client in this matter.
- h. At the initial interview, counsel should ask the client in detail about each of the factors enumerated in 803 CMR 1.33, as well as about details regarding the client's current lifestyle, education, employment, and any other indicators of a stable lifestyle. Counsel should inquire about any physical condition the client may have which would make it less likely that he would commit a sex offense.
- i. Counsel should identify employment, education, treatment, medical, mental health, probation, or other records that may be helpful to the client at the hearing, and obtain from the client the releases necessary for counsel to obtain the records. Counsel should obtain releases that will permit him to view and copy materials from the files of the attorneys who represented the client on the underlying sex offense convictions and sexually dangerous person civil commitment proceedings, if applicable, and who currently represent the client on pending cases.
- j. Counsel should, with the client's help, identify available witnesses whose testimony may be helpful to the client at the hearing.

### **2.3 Obtaining Materials from the SORB**

- a. Counsel should make personal contact with the SORB attorney assigned to the client's case within 5 business days of receiving the Notice of Hearing. Counsel should request that any discovery materials be forwarded to counsel as soon as they become available.
- b. According to SORB Regulations, 803 CMR 1.10 and 1.17(1), counsel will be provided with notice of the hearing not less than 30 calendar days prior to the date of the hearing and, at such time, shall also be provided with a copy of his file as compiled by the Board to make its recommendation. In addition, at least 10 calendar days prior to the hearing, SORB must provide counsel with a copy of any documents the Board intends to introduce into evidence that have not previously been provided. Counsel should contact the SORB attorney if these

materials are not received in a timely manner and, if necessary, file motions asking the hearing examiner to order their production.

- c. Within one week of receipt of the client's criminal record information (CORI), counsel should review the record, telephone the clerks' offices for the courts where the client has sex offense convictions, and determine who represented the client in each case. Counsel should then, where possible, contact each attorney to review the case file and discuss the details of the case with the attorney. Counsel should arrange to obtain copies of any pertinent documents from each attorney.
- d. Counsel should contact attorneys on any pending matter involving the client that may include, but not be limited to, an appeal of a criminal conviction, sexually dangerous person civil commitment, or criminal complaint or indictment.

#### **2.4 Investigation and Preparation for the Hearing**

- a. For each fact favorable to the client that counsel has identified through interviewing the client and reviewing the records, counsel should determine how this information can be placed before the hearing examiner.
- b. Counsel should interview all persons who are potential witnesses at the hearing.
- c. Counsel must attempt to contact any current or recent sex offender treatment provider of the client, to determine if that person is available (and useful) as a witness at the hearing. If the provider is not available, counsel should determine whether any records or a letter or affidavit from the provider may be helpful to introduce into evidence at the hearing.
- d. Counsel should obtain copies of all available treatment records of the client. Counsel should also obtain copies of all the medical records relevant to the client's risk of re-offense or degree of dangerousness.
- e. If the client is currently on probation or parole, or has recently completed probation or parole, counsel should contact the probation or parole officer, interview him/her to the extent possible, and determine whether that person would make a good witness, would be willing to testify, or would be willing to submit a letter or affidavit on the client's behalf.

- f. Counsel should consider documenting the client's current living situation using documents (such as rent or utility receipts), photographs, affidavits (e.g. from a landlord), and/or live testimony.
- g. Counsel should obtain supportive letters on behalf of the client from community members, friends, family, employers, and colleagues.
- h. Counsel should obtain copies of any awards, educational certificates, certificates of program completion (e.g. substance abuse, anger management), job evaluations or other documents that reflect well on the client.
- i. Counsel should obtain all information on client's prior sex offender treatment, including any evaluations, progress reports, therapist's letters, and relapse prevention plan.
- j. Counsel should review all SORB-provided discovery with the client, and investigate any discrepancies between the SORB materials and information counsel has received from other sources.
- k. If the SORB's discovery materials are inaccurate (for instance, if the police report provided by SORB does not reflect the actual facts of the case, or the facts to which the client pled guilty), counsel should first bring any errors to the attention of the SORB attorney, and see if they will agree to a stipulation to the correct set of facts. If counsel cannot obtain a stipulation, s/he must obtain admissible testimonial or documentary evidence to refute the inaccurate information.
- l. If the client is not currently in a treatment program, counsel should discuss with the client the advisability of the client entering treatment prior to the hearing.
- m. If the client does not have a Relapse Prevention Plan, counsel should encourage client to create one, either on his own or with the help of a treatment provider.
- n. Counsel should research the relevant scientific literature on risk of recidivism and consider which articles may be helpful to introduce into evidence at the hearing. If the client is older, a juvenile, female or has other characteristics or circumstances where the empirical research has found a lower risk of recidivism, counsel should familiarize himself/herself with the scientific studies in the area and consider introducing the relevant articles into evidence.

- o. Counsel should consider introducing into evidence any research article cited in the SORB regulations that would support his client's case.
- p. Counsel should obtain copies of the client's records from his incarceration at the Massachusetts Treatment Center, Department of Correction, House of Correction, Department of Youth Services or other facility and determine whether any such records would help the client's case.

## **2.5 Expert Issues**

- a. Counsel should file a pre-hearing motion requesting funds for an expert to evaluate the client and to possibly testify at the SORB hearing, stating, at a minimum, the following grounds: that the funds are necessary for the attorney to effectively represent the sex offender; that the funds are necessary to adequately address SORB's claims of likelihood of re-offense. Counsel should include as much detail as possible without compromising the client's case to support the motion for expert funds. Counsel should preserve the client's rights with respect to the denial of this, and any other, pre-hearing motion by ensuring that the motion is part of the record, and by objecting on the record to the denial of the motion.
- b. Counsel should obtain copies of all sex offender evaluations done of the client in the past. For any recent, favorable evaluations, counsel should contact the evaluator and determine whether he would be willing to testify at the client's hearing, and what his fee would be. Counsel should file a motion for funds for an expert, as described in [2.5\(a\)](#), unless the client or his family has resources sufficient to pay the expert. Counsel should consider issuing a subpoena for the testimony of a treatment provider, if necessary.
- c. Counsel must familiarize himself/herself with the SORB regulations limiting the use of expert reports and testimony (803 CMR 1.17(5)) and any relevant Pre-hearing Orders and Standing Orders, and explore ways of introducing expert reports and testimony within these constraints.
- d. For favorable expert reports or documents that may not be admitted in evidence at the SORB hearing, counsel should nonetheless provide copies to the SORB as part of the reciprocal discovery process, and be prepared at the hearing with copies of these documents. Counsel should move to introduce the documents during the client's case, and if that motion is denied, have the documents marked for identification.

- e. Counsel should discuss with the client the potential waiver of privilege that will result from an expert testifying on the client's behalf.
- f. Counsel should attempt to get a letter in support of the client from any current or recent therapist.

## **2.6 Filing and Obtaining Rulings on Pre-hearing Motions**

- a. Counsel should be familiar with the sample pre-hearing motions in the training materials, and file any motions that are appropriate as soon as possible, but in any event no later than 10 calendar days prior to the hearing. Counsel should ensure that both the assigned hearing examiner and the SORB attorney who has been assigned the case receive copies of these motions. All motions must be accompanied by a supporting affidavit.
- b. Counsel should determine which issues in the case require decision prior to the hearing, and move pre-hearing for rulings on those motions. Counsel should send copies of the motions to the SORB attorney, and directly to the hearing examiner's attention at the SORB. Counsel should follow up with a telephone call to SORB to verify that the hearing examiner has received copies of the motions.
- c. If the client does not speak English, counsel must notify the SORB in writing that an interpreter will be needed at the hearing. If counsel needs an interpreter for pre-hearing preparation, counsel should engage the services of a qualified interpreter. See [Chapter 6](#) of the Assigned Counsel Manual to determine whether counsel may bill CPCS directly for these expenses as an ordinary cost of litigation or whether a motion for funds is required.
- d. Counsel must file a separate pre-hearing motion indicating with specificity which motions counsel wants rulings on prior to the hearing, and moving for such rulings within a requested time frame.
- e. Where supported by the facts, counsel must file a motion that the client be relieved from the obligation to register pursuant to 803 CMR 1.29. If the client's convictions of sex offenses make him ineligible under the regulations, counsel may nonetheless file such a motion, arguing that the limitations laid out in the regulations are unconstitutional and in violation of recent SJC decisions. Counsel should refer to the training materials for sample motions.

- f. Counsel should ascertain as early as possible whether all necessary witnesses will be available on the hearing date. If a necessary witness is unavailable, counsel should move for a continuance under 803 CMR 1.11, and attach a detailed affidavit showing good cause for the requested continuance.
- g. Counsel should never assume that a request for continuance will be granted. Counsel should explore alternative ways of introducing the evidence that would have been elicited from an unavailable witness.
- h. If a ruling on a motion prevents the client from exercising his right to a fair hearing, counsel should explore the option of filing an action to challenge the ruling in Superior Court.

## **2.7 Identifying and Summoning Witnesses and Documents**

- a. Counsel should identify, well in advance of trial, those witnesses and/or documents that counsel will need to summons.
- b. Counsel must submit to the hearing examiner, in writing, at least 21 business days prior to the hearing, requests for subpoenas of witnesses and documents. Alternatively, counsel may have subpoenas issued by the notary public or a Justice of the Peace. G.L. c. 30A, § 12(5).
- c. Counsel should subpoena any probation or parole officer whose testimony is needed at the hearing.
- d. Counsel may request a *capias* from Superior Court for any witness who does not appear in response to the summons. G.L. c. 30A, § 12(5).

## **2.8 Reciprocal Discovery Obligations**

- a. Counsel must timely comply with all reciprocal discovery obligations as described in SORB regulations and all relevant Pre-hearing Orders and Standing Orders.
- b. Counsel must provide to the SORB, at least 10 calendar days prior to the hearing, a copy of any documents that counsel intends to introduce at the hearing, any outstanding substantive motions, a complete witness list and, if intending to present an expert, notice of expert testimony, including the expert's report or a written substantive summary of the expert's findings. 803 CMR 1.17(2) & (3).

### **3. THE REGISTRY BOARD HEARING**

#### **3.1 Client's Right to a Hearing**

- a. Under no circumstances may counsel waive the client's right to a hearing before the SORB without discussing this option in detail with the CPCS Alternative Commitment and Registration Support Unit.

#### **3.2 Obtaining Rulings on Pre-hearing Motions**

- a. Counsel must make a record, at the hearing, of any pre-hearing motions that have been filed by referring to each motion, verifying that it is part of the record, and ensuring that it has been ruled upon. At the hearing, counsel should place objections on the record for each motion that has been denied, stating the basis for the objection and, where appropriate, the way in which the client has been harmed by denial of the motion. Where appropriate, counsel should make an offer of proof as to any excluded evidence.
- b. Counsel should move for reconsideration of any motions which the hearing examiner has denied prior to the hearing.

#### **3.3 Client Default**

- a. If the client does not appear at the hearing, counsel should preserve the client's rights in accordance with the current case law.

#### **3.4. Opening Statement**

- a. Counsel should summarize for the hearing examiner the evidence that counsel expects to present, and the implications of that evidence for the client's sex offender classification.

#### **3.5. The SORB's Case in Chief**

- a. For every witness on the SORB's witness list (if any), counsel should be prepared to cross-examine the witness. Counsel should look for: positive facts to which this witness can testify; any errors or overstatements in the witness' testimony; any omission of positive facts about the client in the witness' testimony or written reports; and any inconsistencies in the witness' testimony or written submissions.

- b. For every document introduced by the SORB, either directly or through a witness, Counsel should be prepared to object to admission and move to strike all or parts of the document based on issues of privilege, relevance, reliability, or other appropriate grounds. Counsel should consider filing motions in limine on specific evidentiary issues.

### **3.6. Putting on a Defense**

- a. Counsel should prepare each of her/his witnesses in advance of the hearing. Counsel should review with the witness the anticipated direct examination, likely areas of cross-examination, and appropriate dress and demeanor for the hearing. Witnesses should be made aware of the details of the client's offense(s) when preparing them for cross-examination.
- b. Counsel should be prepared to introduce into evidence all documents helpful to the client's position. To the extent possible, these documents should be introduced in the context of the testimony of a witness who can explain what each document is and why it is important.
- c. Counsel should, well in advance of the hearing, discuss with the client the advisability of the client testifying. Counsel must advise the client that there is a possibility (however small) that the SORB will call the client to the stand. Counsel must prepare each client to testify at the hearing, regardless of the decision made prior to the hearing as to whether or not counsel will be calling the client to the stand. Counsel should advise the client of his right to submit a letter or affidavit in lieu of testifying.
- d. Counsel should put into evidence any scholarly articles that are helpful to the client; counsel should pay particular attention to articles which contradict the SORB's regulatory factors, 803 CMR 1.33, where such factors are damaging to the client. See section [2.4\(n\)](#) above.
- e. Any expert reports, documents, or testimony that is excluded at the hearing should be marked for identification. Counsel should object to their exclusion from admission on due process, right to a fair hearing, and any other appropriate grounds.
- f. If evidence comes in through the SORB's case that the client is denying or has in the past denied guilt for the sex offenses, counsel should introduce scholarly articles indicating that denial of guilt is not related to an increase in recidivism.

(see e.g., *Sexual Offender Recidivism Risk: What We Know and What We Need to Know*, Hanson, Morton, & Harris; in the training materials). Counsel should, as a general rule, not call a client to testify if he is going to deny guilt for the offenses.

### **3.7. Closing Statement**

- a. Counsel should give a closing statement persuasively summarizing the evidence that points to a low risk of reoffense for her/his client. Counsel should anticipate and respond to SORB's arguments regarding those factors that might point to her/his client having a higher risk of reoffense.
- b. Counsel should be familiar with, and refer to, the regulatory factors listed in 803 CMR 1.33 when making a closing statement.
- c. Counsel should be familiar with, and refer to, articles on sex offender recidivism that support the client's argument, contradict the regulatory factors, where such factors are unhelpful to the client, or support the regulatory factors, where the factors are helpful to the client.

### **3.8. Motion for Delayed Dissemination or Immediate Notice of Decision**

- a. At the close of the hearing, counsel should move orally and in writing that counsel be immediately informed by telephone, email, or fax of the SORB's classification decision, and that the SORB not begin dissemination until three business days after the decision. If this is denied, counsel should do everything possible to obtain a ruling that will give counsel access to the SORB's decision at the earliest possible moment.

### **3.9. Proposed Findings of Fact and Rulings of Law**

- a. At the close of the hearing, counsel should request permission to file proposed findings of fact and rulings of law, and a memorandum in support thereof. Counsel should request sufficient time to prepare a detailed, fact-specific document. Counsel should be familiarize themselves with the sample proposed findings and rulings and memorandum in the training materials. Counsel may also request that the record remain open for submission of additional evidence or for the submission of a legal memorandum on a particular issue that arose in the course of the hearing.

## **4. SUPERIOR COURT REVIEW OF THE HEARING EXAMINER'S DECISION**

### **4.1. Preparing for Superior Court Review**

- a. A complaint for judicial review must be filed within 30 days of receiving the hearing examiner's decision. This is a jurisdictional deadline.
- b. Because counsel will only have a short time to file for superior court review after the hearing examiner's decision (two days if the client is seeking a restraining order, and thirty days otherwise), counsel must begin to prepare for the superior court review prior to the issuance of the hearing examiner's decision.
- c. Counsel must discuss with her/his client, well in advance of the hearing examiner's decision, the range of possible decisions the hearing examiner may reach, and which of these decisions the client would want to appeal. Counsel should also discuss whether the client wants to seek a stay of registration and/or dissemination if the hearing examiner's decision is adverse to the client. Except in extraordinary circumstances, counsel should advise a client who has been classified as a level 3 after a board hearing to appeal the classification decision and to seek a stay of registration and dissemination. In general, counsel should advise a client to appeal a level 2 classification if that does not represent a reduction in the preliminary classification given to the client by SORB. For a client who has chosen to appeal a level 2 classification, counsel should advise the client to seek a stay of registration and dissemination. In preparation of the Superior Court action, counsel should have the client sign the required affidavit of indigency.
- d. On behalf of a client who wishes to seek further review, counsel who cannot identify issues to raise in Superior Court or, for any other reason, is unable to file a complaint for judicial relief should immediately contact the CPCS Alternative Commitment and Registration Support Unit to request appointment of successor counsel.
- e. If the client, after consultation with counsel, has decided to seek a stay of an adverse decision of the hearing examiner, counsel must be prepared to file quickly the superior court papers. Counsel must prepare in advance as much of each of the following documents as is feasible:
  - i. Motion to Proceed in Forma Pauperis
  - ii. Affidavit of Indigency
  - iii. Motion to Proceed under a Pseudonym and Affidavit

- iv. Motion to Impound
  - v. Complaint for Judicial Review
  - vi. Motion for Stay of Registration and Dissemination Pending Appeal
  - vii. Memorandum in Support of Motion for Stay
- f. The complaint for judicial review must state all possible grounds upon which an appeal may be based (see sample Complaint in the training materials).
- g. Counsel and the client should decide in advance in which superior court to file the complaint.
- h. Counsel should make every effort to maintain client contact information that will allow counsel to quickly reach her client once the hearing examiner issues a decision.
- i. In the event that counsel cannot acquire a signed affidavit of indigency in a timely manner, counsel should consider filing all necessary paperwork along with a Motion to Late File Affidavit of Indigency.
- j. Counsel should review and follow all of the statutes and rules governing the review of the hearing examiner's decision in Superior Court, such as G.L. c. 6, § 178M, G.L. c. 30A, § 14, Superior Court Standing Order 1-96, Massachusetts Rules of Civil Procedure, 4, 5, 12, 65, and Superior Court Rule 9A.

#### **4.2. Filing the Initial Papers**

- a. As soon as counsel receives the SORB's decision, s/he must inform the client and consult with the client about whether a complaint for judicial review should be sought. In addition to pursuing the judicial review of the hearing examiner's decision pursuant to G.L. c. 6, § 178M and G.L. c. 30A, § 14, counsel should consider adding a claim under G.L. c. 231A (the declaratory judgment statute), if warranted, and authorized (see section [4.8](#) below).
- b. If the client wants to appeal the SORB's decision and pursue a stay of registration and/or dissemination, counsel must:
- i. File a Request for Transcript with the SORB pursuant to 803 CMR 1.22.
  - ii. Immediately finish preparing the papers listed in [4.1\(e\)](#) above.
  - iii. Arrange to meet the client as soon as possible in the Superior Court in order to file these papers and to have the client sign an affidavit of indigency, if not already signed.

- iv. File the papers listed in [4.1\(e\)](#) above, and request an immediate ex parte hearing on the Motion for Stay (seeking a temporary stay until the motion can be heard with a SORB representative present), the Motion to Proceed in Forma Pauperis, and the Motion to Impound.
  - v. Argue these motions immediately before a judge.
  - vi. Schedule a date for hearing on the Motion for Stay of Registration and Dissemination at which the SORB attorney will be present.
  - vii. All motions filed under a pseudonym must contain the client's SORB number. For example, *Doe No. 8032 v. Sex Offender Registry Board*.
- c. Unless counsel has secured an agreement from SORB to defer dissemination for a period of time after the issuance of the hearing examiner decision, counsel must make every effort to have a motion for temporary stay of registration and dissemination heard within two days of the issuance of the SORB decision. Failure to do this may result in dissemination occurring before counsel has the opportunity to be heard on the Motion for Stay.
- d. Where the client does not want to pursue a stay of registration and/or dissemination, counsel must, within 30 days of receipt of the hearing examiner's decision, follow steps 1 through 4 of [4.2\(b\)](#) above, and file the papers 1-5 of [4.1\(e\)](#) above. This is a jurisdictional deadline and if it is missed, the client loses the right to the G.L. c. 30A review of the Hearing Examiner's decision.
- e. Counsel must make proper service on the SORB of the papers filed in Superior Court in compliance with Mass. R. Civ. P. 4 and 5.

#### **4.3. The Hearing on Motion for Stay of Registration and Dissemination**

- a. Counsel should familiarize himself/herself with the training materials on Motions for Stay, and insure that all possible bases for the motion are asserted and argued.

#### **4.4. Obtaining a Transcript and Copy of the Record**

- a. If counsel has not already requested a copy of the transcript of the SORB hearing pursuant to 803 CMR 1.22(3)(a) (see [4.2\(b\)\(i\)](#) above), counsel should do so immediately.
- b. Counsel should carefully review the transcript and correct any errors using the procedure outlined in 803 CMR 1.22(3).

- c. Counsel should contact the SORB attorney to make sure that counsel is sent a copy of the complete record in the case at the same time that it is filed with the Superior Court.

#### **4.5. Additional Motions that May be Filed in Superior Court**

- a. Counsel should consider whether to file a motion for leave to present additional evidence (G.L. c. 30A, § 14(6)), or a motion for leave to present evidence of irregularities in procedure not shown in the record (G.L. c. 30A, § 14(5)), if warranted by the facts of the case.
- b. These motions must be filed within 20 days of service of the record. See Superior Court Standing Order 1-96. The filings must conform with the requirements of Superior Court Rule 9A.

#### **4.6. Filing and Arguing Motion for Judgment on the Pleadings**

- a. Counsel should carefully review the entire record and identify issues specific to the client's case that are appealable.
- b. Counsel should prepare a Motion for Judgment on the Pleadings and a memorandum in support thereof. The memorandum should address, at a minimum, the following:
  - i. Statement of the Case;
  - ii. Statement of the Facts;
  - iii. Where appropriate, counsel may argue, among other possible grounds, that the hearing examiner has:
    - (a) Not considered certain pertinent factors.
    - (b) Considered factors for which there is little if any evidentiary support in the literature.
    - (c) Considered factors not specified by the SORB.
    - (d) Not given sufficient weight to certain factors.
    - (e) Given excessive weight to certain factors; and has thereby committed errors of law, abused his/her discretion, acted arbitrarily or capriciously, or drawn conclusions against the substantial weight of the evidence.
    - (f) Made a finding or applied a regulation that is in excess of the statutory authority or jurisdiction of the agency.

- (g) Made an error of law by misinterpreting or misapplying a regulation, ruling or statutory provision.
  - (h) Excluded relevant and reliable evidence, thereby denying the client his due process right to present evidence.
  - (i) Allowed and relied upon irrelevant and/or unreliable hearsay evidence, which does not amount to substantial evidence in support of the classification, thereby denying the client his due process rights.
  - (j) Denied the client's motion for expert funds in violation of due process.
  - (k) Issued a decision that is not supported by substantial evidence.
- iv. Counsel should also include arguments to preserve the client's state and federal constitutional rights.
- (a) Counsel should review the memorandum and motion with the client.
  - (b) Counsel should file the motion and memorandum and serve a copy on the SORB in compliance with the rules of civil procedure, and Superior Court Rule 9A. The motion and memorandum must be filed within 30 days of the filing of the record. Superior Court Standing Order 1-96.
  - (c) Counsel should fully argue all bases for appeal that are laid out in the Motion and Memorandum for Judgment on the Pleadings.

#### **4.7. Relief from Final Superior Court Decision**

- a. Rule 60 of the Massachusetts Rules of Civil Procedure allows an attorney to correct any mistakes in an Order or Judgment or to file for relief from the Judgment or Order based on (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for new trial; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment is void under Rule 59(b); (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.
- b. A motion pursuant to Rule 60 must be filed within a reasonable time for reasons (1), (2) and (3) of the rule, the motion must be filed not more than one year after the judgment enters.

#### **4.8. Authorization from CPCS Required for Additional Filings**

- a. Counsel must seek authorization from CPCS prior to filing a rule 60 motion, motion for new trial, complaint for declaratory judgment or any collateral matter.

### **5. PRESERVING THE CLIENT’S RIGHT TO APPEAL TO THE APPEALS COURT**

#### **5.1. Deciding Whether to Appeal to the Appeals Court**

- a. Counsel should discuss with the client whether or not he wants to appeal the decision of the Superior Court to the Appeals Court. Except in extraordinary circumstances, counsel should advise a client who has been classified as a level 3 after an appeal to the Superior Court to appeal the classification decision. In general, counsel should advise a client to appeal a level 2 classification decision if internet dissemination is required as part of the final classification decision that does not represent a reduction in the classification given to the client by the SORB hearing examiner.

#### **5.2. Transferring the Case to CPCS for Appeal to the Appeals Court**

- a. Counsel must file a Notice of Appeal with the Superior Court within 60 days of the entry of the court’s judgment. M.R.A.P. 3, 4. Counsel should serve a copy of this notice to the SORB attorney.
- b. Counsel should immediately notify the CPCS Assignment Coordinator by email to [ac@publiccounsel.net](mailto:ac@publiccounsel.net) and attach the completed SORB Appellate Referral Form. Because Appellate Counsel’s brief is due 40 days after entry of a case on the Appeals Court docket, it is essential that counsel send the Appellate Referral Form to CPCS immediately and that counsel send the client’s file to successor counsel immediately.
- c. If oral argument on the Motion for Judgment on the Pleadings addressed any issues that were not raised in the filed papers, or if other events that occurred at oral argument are pertinent to the appeal, counsel should, within 10 days of filing the Notice of Appeal, order from the court reporter a transcript of the argument of the Motion for Judgment on the Pleadings, pursuant to M.R.A.P. 8(b)(1). See [Chapter 6](#) of the Assigned Counsel Manual to determine whether counsel may bill CPCS directly for these expenses as an ordinary cost of litigation or whether a motion for funds is required. A copy of the transcript order and the supplementary affidavit must be served on the SORB attorney.

- d. If it is counsel's judgment that a transcript of the oral argument is not needed for appeal, counsel must, within 10 days of the filing of the Notice of Appeal, file in the Superior Court clerk's office a letter indicating that s/he does not intend to order a transcript of the proceedings. A copy of this letter must be served on the SORB attorney. M.R.A.P. 8(b)(1).
- e. If counsel has ordered a transcript as described above in [5.2\(c\)](#), counsel must, within 40 days of filing the Notice of Appeal, either file the transcript with the Superior Court clerk or provide the clerk with a signed statement that s/he has ordered the transcript from the court reporter. M.R.A.P. 9(c)(2).
- f. Shortly after completing [\(c\)](#) or [\(d\)](#) above, counsel should receive notice from the Superior Court that the record has been assembled. Within 10 days of receiving this notice, counsel must file in the Appeals Court a motion to waive the Appeals Court filing fee, together with client's Affidavit of Indigency (this Affidavit of Indigency must be on a particular form which is available from the Appeals Court Clerk's Office). If the Affidavit of Indigency cannot be completed and filed within the 10 days, the motion to waive the filing fee should be filed together with a motion for leave to late file the Affidavit of Indigency. M.R.A.P. 10(a)(1).
- g. If the motion to waive the filing fee is allowed, counsel must send a letter to the Clerk of the Appeals Court, requesting that the appeal be entered on the docket. M.R.A.P. 10(a)(1).
- h. Hearings counsel is responsible for completing all these steps to ensure the client's right to appeal is protected. Counsel retains responsibility for the case until and unless another attorney assumes that responsibility. Once appellate counsel has been appointed, hearings counsel should communicate with appellate counsel regarding the steps remaining to perfect the client's appeal and can then transfer the case to appellate counsel. It is at this point that hearings counsel is free to withdraw from the case.
- i. Hearings counsel must cooperate with appellate counsel, or any successor counsel, by providing a copy of the client's file (including contact information, Hearing Examiner decision, work product and other relevant papers) immediately upon request and upon receipt of the client's release. It is expected that the material will be mailed to appellate or successor counsel within 14 days of request absent extraordinary circumstances.

**5.3. Informing Client of His Registration Obligations, Failure to Register Penalties, Right to Move for Reclassification and Right to Move for Early Termination**

- a. Counsel should inform her/his client of the client’s registration obligations under the SORB statute and the fact that failure to comply with his registration obligations may result in criminal sanctions pursuant to the Failure to Register Statute, G.L. c. 6, § 178H. Counsel should also inform the client about his reclassification and early termination rights pursuant to the SORB statute and regulations.

**N. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES**

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<sup>21</sup> These Performance Standards apply to the representation of children and parents in care and protection proceedings, proceedings under G.L. c. 119, § 23(a)(3) and proceedings to dispense with consent, as well as divorce, custody, guardianship and other proceedings in which a right to counsel exists. These standards do not apply to the representation of children in Children Requiring Assistance (CRA) proceedings, pursuant to G.L. c. 119, § 39E-L.

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## **1. GENERAL PRINCIPLES OF REPRESENTATION**

### **1.1 Role of Counsel**

- a. The role of counsel in these cases is to be an advocate for the client within the scope of counsel's appointment. Counsel shall diligently and zealously protect and advance the client's interests, rights and goals in the proceedings. This involves explaining the nature of all legal and administrative proceedings to the extent possible given the client's age and ability, determining the client's position and goals, and vigorously advocating such position and goals. The role of counsel is also to ensure that the client is afforded due process and other rights and that the client's interests are protected.
- b. The role of counsel also is to be an advisor and counselor. This involves explaining the likelihood of achieving the client's goals and, where

appropriate, identifying alternatives for the client's consideration. In addition, counsel should explain the risks, if any, inherent in the client's position.

- c. Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation to the client.
- d. Counsel for a child owes the same duties of undivided loyalty, confidentiality, zealous advocacy and competent representation to the child as is due an adult client, consistent with the Massachusetts Rules of Professional Conduct.

**Commentary:** The child's counsel should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child. Regardless of any alignment of position among the child and other parties, child's counsel should develop his or her own theory and strategy of the case and ensure that the child has an independent voice in the proceedings. Although the child's position may overlap with the position of one or both parents, third-party caretakers or the Department of Children and Families ("DCF"), child's counsel should be prepared to present his or her client's position independently and to participate fully in any proceedings. When consistent with the client's interest, counsel should take every appropriate step to expedite the proceedings.

## **1.2 Appointment of Counsel**

- a. Immediately upon acceptance of an appointment to represent a party, counsel shall, where required, file a notice of appearance with copies to all counsel and, where necessary or strategically important, an objection to the petition on the client's behalf.
- b. Counsel shall decline the assignment if (i) counsel is unable to afford the client prompt, diligent representation, (ii) acceptance of the assignment will create a conflict or potential conflict of interest, or (iii) counsel believes that he or she will not be able to comply with these Performance Standards. If counsel declines an assignment, counsel shall give proper notice to the court.

**Commentary:** Counsel cannot provide prompt, diligent representation of a client if (a) counsel is unable to begin working on the case promptly or (b) counsel is unable to appear in court on an assigned date and cannot arrange a continuance that is consistent with the client's interests. It is counsel's responsibility to be aware of the caseload limits of the Committee for Public

Counsel Services (“CPCS”) found in the CPCS Manual for Assigned Counsel [Chapter 5](#). Counsel should not accept any assignment which will cause him or her to exceed these limits.

### 1.3 Scope of Representation

- a. *Duration of parent’s representation in general.* Except as provided in [par. \(c\)](#), an assignment to represent a parent at the trial level concludes upon the earliest of the following:
  - i. Their child has turned 18;
  - ii. Their child has died;
  - iii. Counsel has withdrawn for all purposes (not merely for purposes of obtaining appellate counsel);
  - iv. The court has stricken counsel's appearance or the appearance of the client, and no appeal has been filed regarding such action;
  - v. The case is dismissed, and no appeal has been filed;
  - vi. The court appoints a permanent guardian for the child, and no appeal has been filed;
  - vii. The court grants permanent custody of the child to a person other than DCF, and no appeal has been filed;
  - viii. The parent’s rights have been terminated, and no appeal has been filed. (If the client requests assistance to enforce any post-termination - but not post-adoption - agreement or order, or to defend against another party’s request to modify or vacate such agreement or order, counsel shall provide such service. Request to re-open NAC forms are available on the website.); OR
  - ix. An appeal of an order under (4) through (8) above reaches its conclusion. The case is considered closed for billing purposes upon conclusion of briefing. Trial counsel who believes that ongoing work after briefing is necessary should contact the CAFL administrative office with regard to keeping the assignment open.
  
- b. *Duration of child’s representation in general.* Except as provided in [par. \(c\)](#), an assignment to represent a child at the trial level concludes upon the earliest of the following:
  - i. The child has turned 18. (Young adults ages 18-22 who continue in, or seek to return to, DCF care have a right to counsel under c. 119, § 23(f),

and counsel shall receive a new NAC and continue to represent the client in those proceedings.);

- ii. The child has died;
  - iii. Counsel has withdrawn for all purposes (not merely for purposes of obtaining appellate counsel);
  - iv. The court has stricken counsel's appearance or the appearance of the client, and no appeal has been filed regarding such action;
  - v. The case is dismissed, and no appeal has been filed;
  - vi. The court appoints a permanent guardian for the child, and no appeal has been filed;
  - vii. The court grants permanent custody of the child to a person other than DCF, and no appeal has been filed; OR
  - viii. The child has been adopted.
- c. *Guardianship and permanent custody decrees and other orders disposing of a case.* In *Care and Protection of Thomasina*, 75 Mass. App. Ct. 563 (2009), the Appeals Court ruled that, unless the court enters an order terminating parental rights altogether, a child's parents retain certain rights in a care and protection case after the appointment of a permanent guardian for the child, including the right to review and redetermination and the right to counsel. If an order is entered under par. [\(a\)vi-vii](#) or [\(b\)vi-vii](#), counsel for a parent or a child should:
- i. Keep his or her NAC open if there is another court date scheduled or future litigation anticipated; OR
  - ii. Close his or her NAC if there is no other court date scheduled and no future litigation anticipated. (The guardian's annual reporting requirement does not count as future litigation.) Before closing the NAC, counsel shall inform the client in writing of the rights that the client retains under *Thomasina*.
- d. *Resumption of representation.*
- i. If, after a NAC is closed under [par. \(c\)2](#), counsel learns that the former client's residual rights under *Thomasina* are being compromised or challenged or are subject to further litigation, or that the former client wants to request further court review, counsel shall request that the NAC be reopened and shall resume representing the former client, unless subpar. 2 applies. [Request to re-open NAC](#) forms are available on the website.

- ii. If counsel is no longer certified to represent CAFL clients or is otherwise unavailable to resume his or her representation of the former client, counsel shall promptly notify the court in writing and ask that certified counsel be appointed for the former client.

**Commentary:** Counsel should also be aware that a case is not considered concluded solely because there has been no recent court activity on the case. Counsel withdrawing from a case should follow the rules set forth in [Standard 8.3](#).

- e. *Appointment of Appellate Counsel.* The appointment of appellate counsel on behalf of a client shall not terminate trial counsel’s ongoing responsibilities to the client in proceedings before the trial court.
- f. *Collateral Representation.* Clients occasionally require legal assistance in proceedings before the Probate and Family Court, District Court or Juvenile Court on matters other than, but integrally related to, that for which counsel was appointed. Such proceedings, which may arise prior or subsequent to the commencement of the proceeding for which counsel was appointed, include, but are not limited to, divorce, custody, guardianship and paternity proceedings. Counsel appointed to represent a client in one proceeding may, with CAFL written permission, bill CPCS for representation of a client in these types of collateral proceedings that (a) directly affect the resolution of an open proceeding for which counsel was appointed, and (b) concern the custody of a child(ren) who is the subject(s) of the proceeding for which counsel was appointed.

Counsel may, without notice to CAFL, represent a client at a Fair Hearing of the Department of Children and Families which (a) directly affects the resolution of an open proceeding for which counsel was appointed, and (b) concerns the child(ren) who is the subject(s) of the proceeding for which counsel was appointed. CPCS reserves the right to deny payment for work done on collateral matters where permission was not requested or was refused.

Authorization for any collateral representation set forth herein ends at the earlier of (a) final judgment in the collateral matter, or (b) the occurrence of any event set forth in paragraphs [\(a\)](#) and [\(b\)](#) “Duration” above. In no event will authorization be given for collateral representation in any matter which requires CPCS certification not held by counsel.

*Commentary:* In care and protection and § 23(a)(3) proceedings, both children and parents are entitled to continued representation in post-trial matters, including foster care reviews, permanency hearings and review and redetermination proceedings. In actions to dispense with consent, the child is entitled to continued representation so long as he or she remains in the custody of DCF. Upon adoption or guardianship finalization, counsel’s representation ends.

In the appropriate circumstance and upon a written request, CPCS will re-open a Notice of Assignment of Counsel (“NAC”) to permit counsel to bill CPCS for representation of a client after the NAC has been closed. For example, counsel may file a motion seeking relief from judgment where sufficient grounds exist. [Request to re-open NAC](#) forms are available on the website.

#### **1.4 Conflicts of Interest**

Counsel must be alert to and avoid all potential and actual conflicts of interest that would impair the ability to represent a client. Particularly when appointed to represent multiple clients, counsel must be alert to the potential for conflicts of interest. The presence of a conflict may require counsel to withdraw from representing one, some or all of the clients. In such event, counsel shall request that the court appoint new counsel.

*Commentary:* Conflicts arise when an attorney is appointed to represent multiple siblings who have different positions (e.g., one child supports the petition and another child opposes the petition). Even though a court may find a parent fit as to one child but not another, counsel cannot, consistent with the ethical rules, simultaneously advocate a parent’s fitness as to one child and unfitness as to another.

A conflict also may arise where an attorney is appointed to represent more than one parent. In situations where there are allegations of domestic violence, counsel should not represent both parents. Even in a case where multiple clients share the same position, a conflict may arise if counsel receives a confidence from one client that the client wishes not be disclosed, but disclosure would advance the interests of the other client. See Mass. R. Prof. C. 1.7, Comment 12C.

Counsel must be alert to the potential for conflict not only at the time of appointment but throughout the representation. A client's position may change as time passes, resulting in a conflict where none existed previously.

The Rules of Professional Conduct permit a lawyer to represent multiple clients, notwithstanding a conflict, if the lawyer reasonably believes to do so would not adversely affect the representation and if each client consents. See Mass. R. Prof. C. 1.7 and Comments. Rarely, if ever, would a situation arise where all the children are competent to consent and, therefore, as a general rule, counsel should always seek to withdraw from representing one or more child clients if a conflict exists among them. Counsel should be mindful of the conflict in continuing to represent any of the multiple clients when counsel holds confidences from some or all of the clients.

Counsel should also be cautious of the potential for conflict of interest in cases where the interests of the client are closely aligned with another, unrepresented person, (e.g., between a child and a relative caretaker). Counsel should never agree to represent such other person. Child's counsel should also be aware of the conflict inherent in accepting any role other than counsel; for example, counsel should not act as a parent proxy in signing an Individualized Education Plan.

In accepting assignments, former DCF attorneys should be mindful of the rules regarding conflicts of interest and successive government and private employment. See Mass. R. Prof. C. 1.7-1.11. Lawyers who practice separately in an office-sharing arrangement should similarly be mindful of the conflict of interest rules and other rules set forth in *Commonwealth v. Allison*, 434 Mass. 670 (2001), and other appellate cases.

## **1.5 Communications with Client**

In all cases counsel must maintain sufficient contact with the client to establish and maintain an attorney-client relationship that will enable counsel to keep abreast of the client's interests and needs and of the client's position in the action.

- a. Immediately upon receipt of notice of the assignment, counsel shall take appropriate steps to locate his or her client. Counsel shall inform the client of the assignment and meet with the client as soon as practicable. To the extent possible, the initial meeting should take place sufficiently prior to any upcoming court hearing to permit counsel to prepare for the hearing. As soon as practicable, and to the extent possible given the client's age and abilities,

counsel shall explain to the client the nature of the court proceedings and applicable law, the role of counsel, and the existence of and limits to privileges covering the client's communications with counsel, therapists, social workers and other relevant individuals. Counsel shall also ascertain the client's circumstances, interests, goals and position in the proceeding.

- b. At a minimum, counsel shall meet with a child client every three months, except under extraordinary circumstances. Irrespective of a child client's age, counsel shall meet with the child client at their residence promptly upon receiving notice of the assignment. Thereafter, counsel shall meet with the child as necessary to provide competent representation to the client, to ascertain the child's circumstances, interests, needs, and positions, to inform and advise the client about the proceedings, as appropriate, and to maintain an ongoing attorney-client relationship with the child.
- c. Except under extraordinary circumstances, counsel ***must promptly meet in person*** with their child client, irrespective of the child's age, when they become aware of any the following:
  1. The child asks to meet counsel in person;
  2. The place where the child is living has changed, regardless of who has custody;
  3. The place where the child is living is about to change and the child is capable of expressing a preference about the change, but counsel and the client have not previously discussed it;
  4. The child has been psychiatrically hospitalized or hospitalized due to an injury or serious illness;
  5. The child is being held at a DYS facility or in a DYS placement;
  6. The child is the victim of a crime;
  7. A 51A involving the child's residence has been newly supported or a question has been raised regarding the appropriateness of the child's placement that warrants investigation by the attorney; or

8. DCF has changed the proposed goal for the family.
- d. If a child client can express a preference, counsel ***must promptly contact the client*** in an age-appropriate and developmentally appropriate way when counsel becomes aware of any of the following:
1. A separation of siblings who were placed together;
  2. A significant change to family time (either the schedule or the nature of the contact);
  3. A change in the child's school during the school year;
  4. A significant school-based issue (repeated absences, discipline, failure of the school to provide necessary services, etc.); or
  5. The place where the child is living is about to change, and counsel and the client have previously discussed the change;  
or
  6. An upcoming trial or hearing on any other issue where the attorney will need to advance the child client's position (including but not limited to a hearing on a substantive motion, a permanency hearing, or a *Rogers* hearing).

***Commentary:*** Establishing and maintaining an appropriate attorney-client relationship with the child client is the foundation of effective representation. It is often more difficult to develop a relationship and trust with a child client than with a parent client. Meeting with the child regularly allows counsel to develop a relationship with the client and to assess the child's circumstances. The child's circumstances, interests, needs and positions change over time. Counsel cannot be fully informed of such changes without developing a relationship through frequent contacts. Accordingly, counsel must meet with child clients at least every three months. Counsel for a child must also meet with or contact the client upon the occurrence of certain events in the child's life or in the child's case as described above. This will ensure that counsel is fully informed of the client's circumstances interests, needs, and positions as the case proceeds.

Under extraordinary circumstances, however, counsel for a child may not be able to meet with the client as required above. For example, the child may be

“on the run” and their whereabouts are unknown, or there may be strong evidence that the child will be adversely affected by meeting with counsel, the child may refuse to meet with counsel, or the child is placed at a distance that makes it impracticable to meet in the situations listed above. Where these circumstances exist, counsel should document any variance from the performance standard, as well as their efforts to meet with or contact their child client, in their case file. Please note that when distance is the issue, counsel must still meet with child clients virtually.

Where the performance standards require contact with the client but do not require that it be in-person, for many older child clients this communication might be possible using Zoom, FaceTime, or other video platforms or through phone calls or text messages. Counsel should assess what type of contact is appropriate given the nature of the issue, the developmental level and maturity of the client, the client’s ability to effectively engage with counsel, the client’s preferences, and any privacy issues. Younger clients may not be able to communicate effectively with counsel in these ways and would instead still require an in-person meeting. Counsel should be mindful of the risks associated with communicating with child clients through letters, email, and text messages. Children may not receive such communications or may not be the only ones to read such communications. This places counsel’s work product and attorney-client privilege at risk.

In order to provide competent representation, child’s counsel should meet with the child in the child’s environment to understand the child’s personal context. Viewing the child in their environment is also an important part of counsel’s required, ongoing investigation (see **Standard 3.1**) and can illuminate whether a client is receiving the services necessary to achieve their goals. (See **Standard 4.1**.)

The benefits of meeting with an older child who can convey information and express their wishes are obvious. However, meeting with younger children, including preverbal children, is equally important. Mass. R. Prof. C. 1.14 recognizes the value of the child client’s input and further recognizes that the degree of input from children may vary depending on their developmental stage. In addition, preverbal children can provide valuable information about their needs through their behavior, including their interactions with their caretakers and other children or adults.

- e. Counsel shall remain in communication with the client during the course of the case to discuss, to the extent possible given the client’s age and abilities, the progress of the case, trial strategy and preparation, negotiation and

settlement strategies, and post-trial goals. Counsel shall inform the parent client of all court hearings and administrative proceedings and inform such client of his or her right and/or obligation to attend such hearings. Where appropriate given the child's age and abilities, counsel should inform the child client of court hearings and administrative proceedings. If the child client expresses a desire to attend a hearing, and such attendance is appropriate given the child's age and abilities and the nature of the proceedings, counsel shall take steps to assure the child's attendance. If the client is involuntarily committed or incarcerated and wishes to attend a hearing, counsel shall make all necessary arrangements for the court to issue a writ of habeas corpus to assure the client's presence at the hearing, and shall, if necessary, ensure service of the writ.

- f. Counsel shall explain the result of all court hearings and administrative proceedings to the client. If a final judgment is adverse to the client, counsel shall explain the client's right to appeal the decision, the appellate process, including the time limits in which a notice of appeal must be filed, and any alternative post-judgment strategy that may be appropriate. Counsel shall also explain the process and availability of post-trial reviews, if applicable. If a final judgment is not adverse to the client, counsel shall ensure that opponents adhere to time limits and discharge other appellate responsibilities until appellate counsel files an appearance. In communicating the results of court hearings and administrative proceedings to a child client, counsel shall provide such information as is appropriate given the child's age, abilities and wish to be so informed.

***Commentary:*** Where counsel is unable to communicate effectively with the client because of either mental disability or language barriers, counsel should take whatever steps are necessary to ensure that he or she is able to communicate with the client and that the client understands the proceedings. Such steps may include obtaining expert assistance or an interpreter.

The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning, implications and consequences of legal proceedings. A client may not understand the legal terminology and, for a variety of reasons, may choose a particular course of action without fully appreciating the implications. With a child the potential for misunderstanding may be even greater. Therefore, the child's attorney has additional obligations based on the child's age, level of education, and language skills. There is also the possibility that, because of a particular child's developmental limitations, counsel may not completely understand the child's responses. Therefore,

child's counsel must learn how to ask developmentally appropriate questions and how to interpret the child's responses. The child's attorney may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication. In addition to initiating contact with the client as described above, counsel should respond promptly to telephone calls, letters, and other inquiries from the client.

## **1.6 Determining and Advocating the Child Client's Position**

- a. Child's counsel should elicit the child's preferences in a developmentally appropriate manner, advise the child and provide guidance.

*Commentary:* Counsel has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determining his or her position. Counsel must be adept at asking developmentally appropriate questions and interpreting the child's responses in such a manner as to obtain a clear understanding of the child's preferences.

In eliciting the child's preferences, counsel should be aware of and understand the factors that influence the child's decision-making process. In addition to communicating with the child client as discussed in [Section 1.5](#) above, counsel should review records and consult with appropriate professionals and others with knowledge of the child. Counsel also may find it helpful to observe the child's interactions with foster parents, birth parents and other significant individuals. This information will help counsel to better understand the child's perspective, priorities and individual needs, and will assist counsel in identifying relevant questions to pose to the child.

Counsel should advise the client of the potential consequences of particular positions. Counsel may express an opinion concerning the likelihood of the court or other parties accepting particular positions. Counsel may inform the child of an expert's recommendations germane to the issue. Counsel should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the child's expressed preferences reflect his or her actual position.

- b. If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel shall represent the child's expressed preferences regarding that matter.

**Commentary:** Rule 1.2 of the Massachusetts Rules of Professional Conduct requires counsel to “seek the lawful objectives of his or her client.” Only if the lawyer determines that the client is incapable of making adequately considered decisions in connection with the representation, may counsel deviate from this requirement, and even then counsel must “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” See Mass. R. Prof. C. 1.14, Client Under a Disability.

A child’s ability to determine his or her own position may depend upon the particular matter to be determined or the circumstances involved at the time. Thus, a child may be able to make some decisions and not others. For example, counsel may reasonably determine that the child is capable of deciding that he or she would like to have visits with a sibling, but is not capable of deciding whether he or she should return home or remain with relatives on a permanent basis. Additionally, as time passes and the child matures, he or she may become more capable of directing the representation.

In determining whether a child is able to make an adequately considered decision, counsel may wish to seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert. Counsel may consider the following factors: the child’s ability to communicate a preference, whether the child can articulate reasons for the preference, the decision making process used by the child to arrive at the decision (e.g., is it logical, is it consistent with previous positions taken by the child, does the child appear to be influenced by others, etc.); and whether the child appears to understand the consequences of the decision. See Report of the Working Group on Determining the Child’s Capacity to Make Decisions, 64 Fordham Law Review 1339 (1996). In assessing the child’s ability to make adequately considered decisions, it is the quality of the child’s decision-making, not the wisdom of the child’s decision that is determinative. For example, the decision of a thirteen-year-old to return home to a marginally fit parent may not be in the child’s best interests, but the child may well be competent to make that decision.

If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel must represent the child’s expressed preferences regarding that matter, even if the attorney believes the child’s position to be unwise or not in the child’s best interest. Requesting the appointment of a guardian ad litem in such cases is contrary to the Rules of Professional Conduct. Of course, the lawyer does have a counseling function and should

advise the client of the potential consequences of his or her position. However, the child's attorney should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the decision the child ultimately makes reflects his or her actual position.

- c. If a child client is incapable of verbalizing a preference, counsel shall make a good faith effort to determine the child's wishes and represent the child in accordance with that determination or may request appointment of a guardian ad litem/next friend to direct counsel in the representation.

*Commentary:* If a child is incapable of verbalizing a preference, counsel may make a substituted judgment determination, i.e., determine what the child would decide if he or she were capable of making an adequately reasoned decision, and represent the child in accordance with that determination. Alternatively, counsel may ask for the appointment of a guardian ad litem to make a substituted judgment determination and to provide direction to counsel concerning the representation. If a guardian ad litem is appointed, counsel should ensure that the role of the guardian ad litem is clearly defined by the court.

In making a substituted judgment determination, counsel may wish to seek guidance from appropriate professionals and others with knowledge of the child, including where necessary, the advice of an expert.

Counsel should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, counsel should determine if the child wishes the attorney to take no position in the proceeding, or if the child wishes the attorney or someone else to make the decision for him or her. In either case, the attorney is bound to follow the client's direction.

- d. If a child can verbalize a preference with respect to a particular matter, but counsel reasonably determines, pursuant to paragraph (b) above, that the child is not able to make an adequately considered decision regarding the matter and if representing the child's expressed preferences does not place the child at risk of substantial harm, then counsel shall represent the child's expressed preferences.

If the child is not able to make an adequately considered decision regarding the matter and if counsel determines that pursuing the child's expressed preferences would place the child at risk of substantial harm, counsel may

choose one of the following options:

- i. represent the child's expressed preferences regarding the matter;
- ii. represent the child's expressed preferences and request the appointment of a guardian ad litem/investigator to make an independent recommendation to the court with respect to the best interests of the child;
- iii. inform the court of the child's expressed preferences and request the appointment of a guardian ad litem/next friend to direct counsel in the representation; or
- iv. inform the court of the child's expressed preferences and determine what the child's preferences would be if he or she was able to make an adequately considered decision regarding the matter and represent the child in accordance with that determination.

***Commentary:*** The most difficult aspect of representing child clients in these cases is determining what position to take when a child can verbalize a preference but counsel believes that the client is not capable of weighing the various options or understanding the consequences of pursuing particular positions.

The Rules of Professional Conduct provide some limited guidance. Rule 1.14(a) provides that where a client is unable to make "adequately considered decisions," the attorney must "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Further, the commentary to the Rule recognizes that there exist "intermediate degrees of competence" and that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Thus, at a minimum, counsel's obligation includes informing the court of the child's expressed preferences.

If the incompetent child's expressed preferences will not subject the child to a risk of substantial harm, counsel is obligated to pursue the child's wishes. Mass. R. Prof. C. 1.14(b) provides that only when the client is incompetent and the attorney believes the client is at risk of substantial harm, may counsel take certain steps to protect the client.

If counsel believes the position chosen by the incompetent child is wholly inappropriate or could result in serious injury to the child, the ethical issues are

far more difficult. Of course, the lawyer has a counseling function and should advise the client of the potential consequences of his or her position. However, the child's attorney should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the decision the child ultimately makes reflects his or her actual position.

If the child cannot be persuaded to change his or her position, paragraph (b) of Mass. R. Prof. C. 1.14 states that when the client is incompetent and the attorney believes the client is at risk of substantial harm, the attorney may take certain steps to protect the client, such as consulting with family members or protective agencies and, if necessary, requesting the appointment of a guardian ad litem. In addition, the commentary to the Rule notes that if a guardian is not appointed, "the lawyer often must act as de facto guardian."

Thus, if counsel believes that advocating the incompetent child's expressed preferences will place him or her at risk of substantial harm, counsel may advocate the child's expressed preferences and request the appointment of a guardian ad litem to make an independent recommendation to the court with respect to the child's best interests. Alternatively, counsel may use a "substituted judgment" standard (i.e., what the child would decide if he or she were competent to do so) to arrive at the child's position, either by making the substituted judgment determination himself or herself, or by asking for the appointment of a guardian ad litem to make that determination and direct counsel accordingly. A substituted judgment determination is not the same as determining the child's best interests. Rather, it involves determining what the child would decide if he or she were able to make an adequately considered decision. If the child is able to verbalize a preference but is not capable of making an adequately considered decision, the child's verbal expressions are an important factor to consider in making a substituted judgment determination.

If the substituted judgment determination and the child's expressed preferences differ, the commentary to Mass. R. Prof. C. 1.14 suggests that counsel must inform the court of both.

## **1.7 Determining and Advocating an Adult Client's Position**

Counsel shall advocate for an adult client's stated preferences and goals in the proceeding and follow the client's direction throughout the course of the case. Counsel should determine whether the client is "under a disability" pursuant to Rule 1.14 of the Massachusetts Rules of Professional Conduct and shall act accordingly.

Nothing herein limits counsel's ability to make strategic legal decisions in the case.

*Commentary:* Counsel should be very cautious in requesting, or responding to a request for, appointment of a guardian ad litem/next friend for a parent because disclosure of the client's disability can adversely affect the client's interests in the proceeding. If a guardian ad litem/next friend is appointed for a parent client, counsel should ensure that the role of the guardian ad litem/next friend is clearly defined by the court.

## **1.8 Protection of Confidentiality, Privileged Communications, and Attorney Work Product**

Consistent with the client's interests and goals, counsel shall seek to protect from disclosure communications and other information concerning the client that are protected by applicable laws of confidentiality and privilege, including attorney work product. Counsel shall explain fully to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. If counsel for a child determines that the child is unable to make an adequately considered decision with respect to waiver, counsel must act with respect to waiver in a manner consistent with and in furtherance of the client's position in the overall litigation. Counsel may request the appointment of a guardian ad litem for the limited purpose of making decisions regarding waiver.

*Commentary:* Counsel shall take whatever steps are necessary to protect the client's privileges and right to confidentiality promptly following appointment to the case. Counsel should not wait until the time for filing pretrial motions to address these matters. Improper disclosure of confidential or privileged information early in the proceeding may color and impact the manner in which the parties, the court investigator, and the court perceive the client, the services offered to the client, and the position taken by the parties. In addition, the underlying purpose of the laws of confidentiality and privilege, to protect an individual's interest in keeping private certain information and certain relationships, is an important goal independent of the effect disclosure would have on the proceeding.

If a child is able to make an adequately considered decision with respect to waiver of a privilege or right to confidentiality, counsel shall advocate the child's position and, if necessary, oppose the appointment of a guardian ad litem to substitute his or her judgment for that of the child. If a guardian ad litem is appointed for a child client, counsel should ensure that the role of the guardian ad litem is clearly defined by the court.

If counsel for a child determines that the child is unable to make an adequately considered decision with respect to waiver, counsel must consider whether to request the appointment of a guardian ad litem for the limited purpose of making a substituted judgment determination with respect to the matter. Counsel should ensure that the guardian ad litem considers only those factors that a competent client would consider. Counsel may wish to ensure that the guardian ad litem consider: (1) the child's expressed preferences, if any; (2) the nature of the communications and the effect on the child of disclosure; and (3) the extent to which disclosure advances or hinders the child's position in the proceeding. Counsel should object to the extent the guardian ad litem considers the need of other parties for the information insofar as the role of the guardian ad litem is to make a substituted judgment determination, not to weigh the relative benefits and harms to the child and other parties.

Counsel must be prepared to respond to any attempt by another party to waive or invoke the client's privilege or right to confidentiality.

## **1.9 Missing Parent Clients**

In the event a client's whereabouts are unknown, counsel shall take a position in court and administrative proceedings consistent with the client's last clearly articulated position or directive. In the absence of such information, or in the event circumstances have changed materially since the client last articulated a position, whether or not to take action on behalf of such client is a matter left to the discretion of counsel consistent with the Massachusetts Rules of Professional Conduct.

*Commentary:* The whereabouts of a client may, for any number of reasons, become unknown to counsel. If the client's whereabouts become unknown during the course of a case, counsel should take any actions which are consistent with the last clearly articulated position or directives of the client. In the absence of such information, any action taken on behalf of the client is left to counsel's discretion.

Except as otherwise set forth in [Commentary to Standard 2.1](#), if counsel has never had contact with a client or counsel is unable to contact the client after diligent efforts, counsel may either (a) withdraw from the representation, or (b) take no position in the proceedings but take such actions as counsel deems necessary and appropriate to protect other rights and interests of the client, such as rights to confidentiality and the exercise of privileges. See [Standard 8.3](#).

## 2. TEMPORARY CUSTODY (INCLUDING 72-HOUR) HEARINGS

### 2.1 Right to Hearing

Counsel shall assert and protect the client's right to temporary custody (including 72-hour) hearings.

*Commentary:* A temporary custody hearing (including the so-called "72-hour hearing") is an event of crucial strategic importance in child welfare cases. Because of the potential for serious ramifications to the parent-child relationships and the safety of the child, due process demands that clients receive diligent, zealous representation of counsel at such hearings. This is true whether the client supports or opposes a transfer of temporary custody. If the parents consent to a temporary order of custody to DCF, and if the child's position is to be placed in the temporary custody of a relative or other individual, counsel for the child should assert the child's right to a temporary custody hearing to present evidence in support of his or her position. See *Care and Protection of Manuel*, 428 Mass. 527 (1998).

The statute governing probate court orders of temporary custody to DCF does not contain all of the procedural safeguards that are mandated in the juvenile court. In probate and family court proceedings, counsel should assert the client's right to a temporary custody hearing consistent with due process. A client in the probate and family court should receive no less procedural protection than that afforded similarly situated clients in the juvenile court. See *Adoption of Donald*, 44 Mass. App. Ct. 857 (1998).

*Postponement by court:* The trial court may, due to scheduling difficulties, inform counsel of the need to postpone a temporary custody or 72-hour hearing. If such a continuance is inconsistent with the client's interests or goals, counsel should object to any such postponement. If necessary, counsel should consider pursuing the client's right to a timely hearing by taking an interlocutory appeal.

*Requesting continuances:* In some instances, counsel may not receive notification of his or her assignment in time to prepare adequately to represent the client at a temporary custody hearing or to summons witnesses or documents. Should this occur, counsel should advise the client of counsel's need for additional time to prepare and, if the client consents, object to proceeding with the hearing and seek a short continuance, provided that the benefit of a continuance outweighs the

prejudice of not going forward. Counsel may also need to request a continuance or reserve the client's right to a hearing if the client is unavailable due to illness or some other reason.

*Denial of right to hearing:* If the court denies a client his or her right to a temporary custody or 72-hour hearing, and such denial is inconsistent with the client's interests and goals, counsel should consider pursuing the client's right to a hearing by taking an interlocutory appeal.

*Presence of client:* If a parent client is not present as a consequence of failure of notice by the court or DCF, counsel should object to proceeding without the client and seek to preserve the client's right to a 72-hour hearing. If a client is incarcerated or involuntarily committed, counsel should file a habeas corpus petition seeking transportation of the client to court. If such a petition is impracticable or a habeas order unenforceable (as it may be in cases where the client is incarcerated outside the commonwealth or in the federal system), counsel must file a motion asking the court to accommodate the client's right to participate in the proceedings through closed circuit television, telephone, or by some other means. If a child client wishes to attend a hearing, and such attendance is appropriate given the child's age and abilities and the nature of the proceedings, counsel should assure the child's attendance.

*Counsel without direction from client:* If counsel is without direction from a client as to his or her goals at the hearing, counsel should seek to protect and preserve the client's due process rights. Counsel should, depending on the circumstances, request a continuance of the hearing or take such other steps as are necessary to preserve the client's right to a temporary custody hearing.

## **2.2 Preparation for Hearing**

In preparation for the temporary custody (including 72-hour) hearing,

- a. counsel shall:
  - i. conduct an initial interview with his or her client, determine the client's position, advise the client as to the merits of the case, and develop a strategy for preparing for and conducting the hearing;
  - ii. discuss with the client his or her right to refuse to give certain testimony under the 5th Amendment of the U.S. Constitution and Article XII of the Massachusetts Declaration of Rights; and

- iii. review all pleadings filed in the case, any reports of suspected abuse or neglect filed pursuant to G.L. c. 119, § 51A or § 51B regarding the incident(s) which led DCF to petition the court for legal custody, and all documents to be submitted as evidence at the hearing.
- b. counsel shall, if applicable and to the extent practicable:
- i. review other portions of the client's DCF file, any pleadings filed in other child welfare cases involving the client, and any other relevant records;
  - ii. if consistent with the client's interests and goals, identify relatives, family friends, or other persons who are potential placement or custody options, and take such steps as may be necessary to offer such persons to DCF and/or to the court for placement or custody determinations; and
  - iii. if consistent with the client's interests and goals, identify and interview potential witnesses, prepare such witnesses for the hearing, and subpoena documents and/or witnesses to appear at court for the hearing.

**Commentary:** Depending on the client's interests, it may be appropriate to seek a grant of temporary custody by the court to the relative, family friend, or other person identified by the client. This is to be distinguished from a grant of custody to DCF, who can then place the child in foster care with that person. Counsel should advise the client and the placement/custody option on the differences and relative advantages and disadvantages of temporary custody versus foster care, including but not limited to issues such as the authority to make decisions regarding the child's care, eligibility for grantee-relative benefits through the Department of Transitional Assistance and/or foster care payments, eligibility for services offered by DCF, and visitation.

The alternative remedies of a return of custody to the parent and a grant of custody to a relative, family friend, or other identified custody option are not mutually exclusive at the 72-hour hearing. Counsel need not choose between these options, and, if consistent with the client's interests and goals, must be prepared to pursue said alternative remedies at the 72-hour hearing.

### **2.3 Conduct of Hearing**

To the extent consistent with the client's interests and goals as determined pursuant to these Performance Standards, counsel shall, at the temporary custody (including 72-hour) hearing:

- a. file any and all appropriate motions and legal memoranda, including but not limited to motions regarding (i) placement or custody of children, (ii) visitation, (iii) the assertion of privileges and confidential relationships, and (iv) the admission, exclusion or limitation of evidence;
- b. present and cross examine witnesses, and provide evidence in support of the client's position;
- c. make any and all appropriate evidentiary objections and offers of proof, as to preserve the record on appeal; and
- d. take any and all other necessary and appropriate actions to advocate for the client's interests and goals.

*Commentary:* Counsel must also remain cognizant of the provisions of G.L. c. 119, §§ 24 and 29C obligating the DCF to make reasonable efforts, prior to removing a child from the home, to eliminate the need for said removal. If appropriate, counsel should ask the court to certify that DCF failed to make reasonable efforts to prevent removal. Counsel should be aware that such a certification at this stage of the proceeding may bar a child from receiving certain services or subsidies if placed out of state.

### **3. INVESTIGATION AND DISCOVERY**

To develop and support the client's position, counsel shall conduct a thorough and continuing investigation at every stage of the proceeding which is independent of that of any other party to the proceeding and of any court investigator or guardian ad litem appointed by the court.

*Commentary:* Thorough, thoughtful and independent investigation is necessary for counsel to develop the client's position and a theory of the case, advise the client and identify potential evidence, whether beneficial or detrimental to the client's position.

#### **3.1 Informal Discovery**

- a. **Meet with Client.** Counsel shall meet with the client and obtain from the client information relevant to the proceeding and the client's position.

*Commentary:* The client is an important and primary source of information regarding the facts of the case, the family and its history. The client may also assist counsel by identifying sources of information and records which may

be relevant to the proceeding. Even with very young children, counsel can obtain valuable information from meeting with the child and viewing the child in his or her environment. (See [Standard 1.5](#) “Communications with Client.”)

Counsel should maintain an adequate, contemporaneous record of such client interviews.

- b. **Review of DCF Records.** DCF records are an integral part of the preparation of a case. Counsel shall obtain the entire social services file. These records may be obtained through a formal or informal process.

*Commentary:* Counsel may be able to obtain the records informally by a written request to the DCF office. However, counsel should also be aware of the Juvenile Court rules and the Code of Massachusetts Regulations regarding discovery. For Probate and Family Court actions, counsel may need to file appropriate requests for production of documents.

While the Juvenile Court Rules do not define what is meant by the “entire” social services file, a review of the DCF Policies and Procedures Manual provides guidance as to the potential documents which will be generated or obtained by DCF when servicing a family. The records received from DCF may not contain the home finder records or any other records on the foster or pre-adoptive home. Counsel may need to file a motion to obtain those records.

- c. **Review of Court Records.** Counsel shall review court records for the proceeding in which she or he is appointed on an on-going basis. Such review shall include any court investigator, guardian ad litem, family service or probation officer reports.
- d. **Other Records.** Counsel shall review relevant social service, medical, psychiatric, psychological, substance abuse, law enforcement, CORI and school records, as well as records of other court proceedings, as appropriate, and take the necessary steps to obtain such records.
- e. **Interviews.** Counsel shall contact and interview, where appropriate, those individuals with information concerning the family, such as parents, relatives, caretakers, neighbors, DCF social workers and other social service personnel, school personnel, day care providers, medical providers, treatment providers, former counsel, probation officers, family service officers as well as those individuals who are suggested by the client or identified through investigation or discovery as potential witnesses.

**Commentary:** Counsel should be mindful of Rule 4.2 of the Massachusetts Rules of Professional Conduct, which prohibits an attorney from communicating about the subject of the representation with a person known to be represented by another attorney in the matter unless the other attorney consents. When the represented “person” is an organization such as DCF, Rule 4.2 only prohibits ex parte contact with those employees: (1) who exercise managerial responsibility in the matter; (2) who are alleged to have committed the wrongful acts at issue in the litigation; or (3) who have authority on behalf of the organization to make decisions about the course of the litigation. Neither the rule nor case law speaks to whether, or the circumstances under which, counsel may contact DCF social workers or other DCF employees without the consent of DCF counsel. Counsel should consult Rule 4.2, the commentary thereto, and *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347 (2002), for guidance on this issue.

- f. **Meet with Client.** Counsel shall meet with the client and obtain from the client information relevant to the proceeding and the client’s position.
- g. **Physical Evidence.** To the extent practicable, counsel shall view any relevant physical evidence.
- h. Counsel shall contact opposing counsel to gather information about the case and the positions of the other parties.
- i. Counsel should, if appropriate, necessary and practicable, attend all service planning, treatment and placement meetings, administrative reviews and hearings and other proceedings involving the client. In addition, if counsel represents a child, counsel should, if appropriate, necessary and practicable, attend school conferences.

### 3.2 Formal Discovery

Counsel shall, if necessary, conduct formal discovery (a) to develop a more formalized record for trial, (b) to obtain in a timely manner the information necessary to develop and support the client's position and/or (c) to understand an opponent's case. At a minimum, counsel’s strategy should include consideration of the following types of formal discovery: depositions, interrogatories (including expert interrogatories), requests for production of documents, requests for admissions, and motions for mental or physical examination of a party.

Counsel shall, consistent with the client's interests and goals, and where appropriate, take all necessary steps to preserve and protect the client's rights through opposition to the discovery requests of other parties. This includes, but is not limited to, invoking applicable privileges and rights to confidentiality, raising objections on the basis of relevance, and seeking appropriate limitations on the discovery requested.

*Commentary:* Counsel should timely file and seek court action on any motions to permit, compel, assist or oppose discovery as required by the applicable court rules or the Indigent Court Costs Act. In addition, counsel may deem it appropriate to seek sanctions for a party's failure to comply with discovery requests or orders.

#### **4. SEEKING CLIENT OBJECTIVES**

##### **4.1 Obtaining Services for the Client and His or Her Family**

Consistent with the client's interests and goals, counsel shall request that DCF provide appropriate services in a timely manner to the client and/or members of his or her family. The attorney shall negotiate with DCF for the development of a service plan that meets the client's interests and needs and advances the client's goals in the litigation. In the event that DCF's proposed service plan does not meet the interests or needs of the client, counsel may, as appropriate, challenge the service plan through available administrative and judicial means. As necessary, counsel should investigate the availability of services or benefits provided by other public or private agencies or organizations and seek such services for the client.

*Commentary:* Counsel should make an independent determination of what services are necessary to meet the client's needs and to advance the client's interests in the litigation. Counsel should consider any barriers to the client's use of available services including disabilities or transportation, language or cultural barriers and seek to overcome such barriers.

Services may include: family preservation-related prevention or reunification services; sibling and family visitation; domestic violence prevention, intervention and treatment; medical care; mental health services; substance use disorder treatment; parent and home health aides; parenting education; respite services; independent living services; specialized or long-term foster care; adoption

services; education; recreational or social services; housing; financial assistance; vocational or employment-related services.

Counsel may advocate that services be provided to the client, to another family member, or to the child's substitute caretaker. For example, where the child supports reunification, child's counsel may advocate that the parent receive particular services necessary to enable the parent to care properly for the child. Alternatively, parents' counsel may advocate for the child to receive particular services necessary to permit the child to return home.

Counsel should be aware that the DCF regulations require that, to the greatest extent possible, the service plan be developed jointly with the family. It is important that counsel actively participate in service planning for the client.

Where counsel represents a child for whom the permanent plan is guardianship or adoption, counsel should seek to ensure, prior to the adoption or guardianship finalization, that the child and permanent caretakers will receive all necessary and appropriate post-guardianship or post-adoption services and subsidies for which they may be eligible.

#### **4.2 Visitation**

At each stage of the proceeding, counsel shall assert the client's rights to, or interests in, parent-child, sibling or other visitation.

#### **4.3 Custody and Placement**

At each stage of the proceeding, counsel shall zealously advocate for placement or custodial options consistent with the client's goals and objectives, and should be prepared to present alternative placements with family members or friends.

#### **4.4 Communicating with the Court Investigator/Guardian ad Litem**

- a. Counsel shall contact the court investigator/guardian ad litem as soon as practicable to inform him or her of the attorney's role and of the client's position.
- b. Counsel shall, if appropriate, revoke all authorizations for the release of confidential information and oppose motions seeking access to such

information.

- c. Counsel shall inform the client of the role of the court investigator/guardian ad litem, including the consequences of cooperating or failing to cooperate with the court investigator/guardian ad litem, and prepare the client for the interview.
- d. Counsel shall be present at any interviews of the client by the court investigator/guardian ad litem, unless there are compelling reasons why counsel's presence would be unnecessary.
- e. Counsel shall assist the court investigator/guardian ad litem in obtaining information that supports the client's position.

*Commentary:* Counsel's presence at the court investigator's or guardian ad litem's interview with the client not only provides support for the client but ensures that the client has the opportunity to fully answer all questions and to present information, including the names of other persons to be interviewed, that is helpful to the client's case. Counsel's presence can be invaluable in preparing future cross examination of the interviewer. It also permits counsel, where appropriate, to advise the client not to answer specific questions posed by the interviewer or not to sign releases in the form submitted.

Many of the standards herein may apply as well to evaluations by other persons evaluating or interviewing the client, such as court appointed special advocates (CASAs), court clinicians, family service officers or probation officers.

#### **4.5 Filing Pleadings**

Prior to trial, counsel shall, as necessary, file petitions, motions, responses or objections to protect the client's rights and interests and to advance the client's position in the case. Relief requested may include, inter alia, temporary custody orders; orders concerning visitation; rulings that DCF has abused its discretion; court-ordered evaluations; funds for experts or other services necessary for representation permitted under the Indigent Court Costs Act; restraining orders; contempt for non-compliance with a court order; protective orders concerning the client's privileges and right to confidentiality; appointment of guardians ad litem; or dismissal of petitions or motions.

## 4.6 Interlocutory Appeals

### a. Petition to Single Justice.

Trial counsel shall, where appropriate, seek interlocutory relief from an order of the trial court by filing a petition to a single justice or through other appellate means. Counsel shall provide CAFL administrative office with a copy of the petition and any supporting memoranda.

*Commentary:* As a general rule CPCS does not assign certified appellate counsel to represent clients in interlocutory matters before the single justice sessions of the appellate courts, and trial counsel remains responsible for such representation. Resource Attorneys and the CAFL administrative staff are available to provide advice on interlocutory matters on a case by case basis. In certain circumstances, CAFL staff may be able to assign a mentor to counsel to assist with the filing of the petition or even assign certified appellate counsel.

### b. Appeal of Single Justice Order.

Trial counsel shall, where appropriate, appeal an adverse order by the single justice to the full appellate court. In the event counsel elects to appeal an order of a single justice, or if the single justice reports his or her decision to the full appellate court, counsel shall promptly (i) contact CAFL for the assignment of certified appellate counsel to work on the appeal, and (ii) provide CAFL with copies of all papers filed in the appellate court that were not already provided under [section \(a\)](#) above.

## 4.7 Experts

- a. Counsel shall retain an expert where reasonably necessary to assist counsel in preparing or presenting the case.
- b. If counsel determines that expert assistance is necessary, counsel shall file a motion under the Indigent Court Costs Act to obtain the necessary funds for hiring an expert. If the motion is denied in whole or in part, counsel shall consider filing a notice of appeal in accordance with G.L. c. 261, § 27D.
- c. Counsel shall protect the confidentiality of all expert-related information including as necessary: filing motions for costs on an ex parte basis;

requesting impoundment of the motion for costs; and informing the expert about the attorney-client privilege and attorney work-product protection.

**Commentary:** Otherwise discoverable documents enjoy a qualified immunity from discovery if they are attorney work product pursuant to Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure. Work by an expert retained by counsel is similarly protected. Counsel should take steps to safeguard the expert's work product, including filing the motion for costs *ex parte* and seeking impoundment of the motion. Counsel should send the expert an engagement letter that explains the expert's role in assisting counsel, and directs the expert to speak to no one about his or her work without counsel's permission. In the event counsel makes a strategic decision to share the results of the expert's work, counsel should convey such results him- or herself; counsel should not allow another attorney to speak to directly to the expert. If counsel fails to take adequate precautions, he or she may inadvertently waive the work product protection. *See Adoption of Sherry*, 435 Mass. 331 (2001).

- d. Counsel shall be familiar with the foundational requirements for the admission of expert testimony.

**Commentary:** Counsel may hire a "testimonial expert" to provide testimony in a hearing or trial, or a "preparatory expert" to provide assistance to counsel in preparing the case. The need for expert assistance should be considered throughout the case, for example at the temporary custody hearing, an abuse of discretion hearing, trial or permanency hearing. More than one expert may be needed in a particular case.

For testimonial experts, adequate preparation is essential. Adequate preparation is also essential if counsel is opposing admission of expert testimony. Counsel should be aware that expert opinion comes not just from hired experts. Fact witnesses, such as social workers, guardians ad litem, court investigators and treatment providers may also offer expert opinion. Counsel should be prepared to satisfy or challenge the foundational requirements of such opinions.

## **5. PERMANENCY HEARINGS**

### **5.1 Right to Hearing**

Counsel shall assert and protect the client's right to a hearing on the permanency plan for the child.

**Commentary:** The court may choose to conduct a permanency hearing in conjunction with an adjudicatory hearing on the merits of the petition. Counsel should object if this is prejudicial to the client. Counsel should zealously advocate for the client in the permanency hearing in addition to any obligation he or she may have in the adjudicatory hearing.

In the event that the court denies or improperly limits the client's right to a permanency hearing, counsel should consider pursuit of any available avenues for relief, including but not limited to interlocutory appeal, or appeal under G.L. c. 119, § 29B. Counsel should ensure that the appellate record is preserved by making detailed and specific offers of proof through, among other methods, affidavits or oral or written proffers.

## **5.2 Preparation for Hearing**

In preparation for the permanency hearing, consistent with the client's interests and goals, counsel shall:

- a. obtain and review the permanency plan for the child filed by the petitioner, and determine the extent to which the plan is consistent with the client's position;
- b. if the proposed plan is inconsistent with the client's position, file a timely objection;
- c. conduct any necessary discovery;
- d. determine what evidence to present;
- e. prepare for the direct and cross examinations of witnesses; and
- f. take all necessary and appropriate steps to ensure the availability and presentation of evidence at the hearing, including but not limited to the issuance of subpoenas and the filing of motions.

**Commentary:** Counsel should be familiar with Trial Court Rule VI, Uniform Rules for Permanency Hearings. Counsel should seek a continuance of the permanency hearing when the petitioner has not complied with Trial Court Rule VI, unless a continuance is inconsistent with the client's position.

## **5.3 Conduct of Hearing**

During the hearing, counsel shall act as a zealous advocate. To the extent consistent with the client's interests and goals, counsel shall:

- a. file all appropriate written objections, motions, and/or legal memoranda;
- b. present and cross examine witnesses;
- c. make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal;
- d. consistent with the client's goals, advocate for a finding as to reasonable efforts; and
- e. prepare requested findings of fact, conclusions of law, and proposed orders.

**Commentary:** Because the issues to be litigated at a permanency hearing often overlap with those to be litigated at a trial, the court may be inclined to limit the scope of the evidence to be presented at the permanency hearing. Consistent with the client's position, counsel should object to any limitations placed on the client's ability to present evidence.

There may be situations in which it is strategically advantageous to not fully litigate at the permanency hearing. Counsel must consider whether it better serves the client's interests to wait until the trial or other stage of the proceeding to present and/or object to evidence.

Where appropriate, counsel should seek to secure specific orders at the permanency hearing, as a means for expediting permanency for the child. For guidance regarding the client's participation at the permanency hearing, see Standards [1.9](#), [2.1](#) and [6.1\(h\)](#) and [commentary](#) thereto, concerning the presence of the client and the client's direction to counsel.

#### **5.4 Appeal**

If the client wishes to appeal the permanency hearing decision, counsel shall file a timely appeal and follow the rules set forth in [Standard 8.1](#).

### **6. TRIAL PREPARATION AND CONDUCT**

#### **6.1 Trial Preparation**

Counsel shall take all necessary and appropriate steps to fully prepare, defend and present the client's position at trial.

**Commentary:** In order to effectively prepare and defend the client's case, counsel should have a theory of the case, i.e., a cogent statement of a position that justifies the outcome. Throughout trial preparation, counsel needs to consider the theory of the case and how each piece of evidence affects the theory.

**a. Pretrial motions**

Counsel shall prepare and file pretrial motions that advance the client's interests and seek to have such motions heard expeditiously by the court.

**Commentary:** Counsel should consider the full range of pre-trial motions available to advance the client's position at trial. Such motions may include, inter alia, discovery motions; motions in limine to exclude evidence; motions to strike; motions for speedy trial and consecutive days of trial; motions for visitation; motions to bifurcate proceedings; and motions for stenographic record and for the allowance of funds pursuant to the Indigent Court Costs Act, G..L. c. 261, §§ 27A-G.

**b. Counsel shall determine what evidence will be submitted to the court.**

**Commentary:** Counsel shall identify all lay and expert witnesses as well as all documentary, demonstrative and physical evidence that he or she will seek to introduce into evidence in the client's behalf. In addition, counsel shall be prepared, when necessary, to cross-examine all witnesses called by other parties and object to, or file appropriate limiting motions as to, documentary evidence proffered by other counsel.

**c. Pretrial conference.** Counsel shall notify the client of the pretrial conference date in writing and shall prepare for the pretrial conference. Counsel shall seek to discuss with other counsel and/or pro se litigants contested and uncontested facts and issues. Such preparation may also include the drafting and filing of motions in limine and pretrial memoranda in accordance with the pretrial orders, rules or practices of the court.

**Commentary:** The purpose of the pretrial conference is to determine contested and uncontested facts, simplify issues for trial, explore settlement opportunities and estimate accurately the necessary trial time for the court.

Counsel should request that the court establish a deadline for outstanding discovery requests and the exchange of final witness and exhibit lists prior to

trial. Counsel may also consider seeking consecutive trial dates or the sequestration of witnesses. Counsel should endeavor to take all steps to advance the clients position including, where possible entering into stipulations of uncontested facts or stipulations to testimony.

Counsel should be aware that Juvenile Court Rule 8 requires counsel to submit any motions in limine relative to the court investigator's report at the time of the pretrial conference. Failure to submit such motion in accordance with the rules may prohibit counsel from submitting it at a later date, thereby precluding counsel from objecting to such evidence.

**d. Scheduling of Trial**

Where consistent with the client's interests, counsel shall take all steps necessary to assert the client's right to a prompt trial, which may include objecting to continuances or moving for protective orders, sequential trial dates, or a speedy trial.

**Commentary:** There are a number of issues that can result in trial delays, such as the need for a foreign language or sign language interpreter, stenographer, or audio-visual equipment to permit an incarcerated client to participate in the proceedings. Counsel must consider these issues in his or her trial preparation.

- e. Counsel shall take all necessary and appropriate steps to assure the availability and submission of evidence at trial.

**Commentary:** Counsel should provide written notification of the trial date to the client and all witnesses. Counsel should determine the availability and willingness of witnesses to appear and testify at trial. If witnesses are unavailable on the date that the trial is scheduled, counsel should consider the necessity of seeking a continuance of the trial if the testimony is crucial to the client's position or, in the alternative, explore other methods of introducing the testimony into evidence. If the appearance of a witness or party necessitates the issuance of a subpoena or writ of habeas corpus, counsel should seek the issuance of such process and take steps to assure the payment of any fees associated with such process.

Counsel should take all necessary action to assure that documentary evidence is available for introduction into evidence. Counsel should consider utilizing various statutory remedies, including the issuance of subpoenas duces tecum

in this regard. In conjunction with all counsel, counsel should consider preparing an exhibit book containing stipulated and contested documentary evidence for the convenience and benefit of the court.

Counsel should consider assembling a trial notebook which contains, inter alia, witness testimony, exhibits, pretrial orders, pleadings, evidentiary memoranda, statutory and decisional law, timeline, genogram, family history, etc. to assist counsel's organization during trial. Counsel shall, as appropriate or where requested by the court, prepare evidentiary memoranda, requests for rulings and findings of fact and rulings of law consistent with the client's position and the anticipated evidence.

- f. **Preparation of witnesses.** Counsel shall prepare his or her own witnesses for direct and cross examination in advance of trial.
  
- g. **Participation of parent client:** Counsel shall fully prepare the parent client to testify and shall discuss with him or her the desirability of the client testifying at trial and the adverse inferences which may be drawn by the court in the event that a parent client does not testify. Further, counsel shall advise the parent client that an opposing party may call the parent client as a witness. Counsel shall discuss with the parent client his or her right to refuse to give certain testimony under the 5th Amendment of the U.S. Constitution and Article XII of the Massachusetts Declaration of Rights.

*Commentary:* The parent client's testimony can be the most helpful or damaging evidence to the client's case, depending on preparation. Such preparation should include multiple meetings with the client to explain the testimonial process and to participate in mock direct and cross-examinations of the client.

If the parent client is incarcerated counsel must visit the client to ensure proper preparation. Counsel shall seek to ensure an incarcerated client's presence at trial by petition for habeas corpus. If the client's presence cannot be secured, counsel shall seek to preserve the client's right to participate in the proceedings by filing a motion for some other form of accommodation such as closed circuit television or telephone. See also [Section 2.1 Commentary](#).

- h. **Participation of child client:** Counsel for a child client should accommodate the expressed wishes of a competent child client to be present during trial. In

determining whether to call the child client as a witness, counsel shall consider the child's competency to testify, the need for the testimony, the harm that such testimony may cause the child and the child's expressed wishes. Counsel shall prepare the child to testify and seek appropriate accommodation for the child from the court to minimize any anticipated trauma. Where appropriate, counsel shall oppose the efforts of other parties to call the child as a witness.

**Commentary:** Counsel should prepare the child in an age appropriate manner to testify at trial. Counsel may wish to consult persons familiar with the child or retain an expert to assist in such preparation.

If the child does not wish to testify, but counsel determines that the child's testimony would further the child's position, counsel should explore whether there are alternative means for the court to admit any statements of the child which may be relevant to the proceeding, such as exceptions to the hearsay rule or the inclusion of such statements in any report of the court investigator and/or guardian ad litem. In addition, counsel should examine whether evidence which the child might give the court is available from other witnesses.

If the child does not wish to testify, but is subpoenaed to testify, and testifying could be harmful to the child, counsel should seek to quash the subpoena through the presentation of evidence as to said harm to the child. Alternatively, counsel should determine if the evidence can be admitted through any of the other means described in the preceding paragraph. If the child must testify, counsel should seek to minimize any harm to the child by requesting special accommodations for the child's testimony, such as altering the location of the testimony, allowing the child to testify informally and in a developmentally sensitive manner outside the presence of other parties to the proceeding, using leading questions, or limiting the scope of cross examination. See *Adoption of Roni*, 56 Mass. App. Ct. 52 (2002).

The child may wish to be present during trial. While counsel should assure that the child is brought to court, he or she should also counsel the child that the judge may nevertheless exclude the child from the courtroom in an effort to shield the child from potential trauma.

## **6.2 Trial Conduct**

During trial, counsel shall act as a zealous advocate for the client by ensuring that proper procedures are followed and that the client's interests are represented. To

the extent consistent with the client's interests and goals, counsel shall:

- a. File all appropriate motions and legal memoranda, which may include motions regarding (i) post-termination and/or post-adoption contact, (ii) sibling visitation, (iii) the assertion of privileges and confidential relationships, (iv) the admission, exclusion or limitation of evidence to be presented, i.e., motions in limine; or (v) the sequestration of witnesses;
- b. Present and cross examine witnesses and provide evidence in support of the client's position;
- c. Make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and
- d. Prepare proposed findings of fact and conclusions of law.

**Commentary:** Although a client's position may be consistent with that of another party, counsel for that client remains responsible for presenting evidence and witnesses. Counsel should also make all necessary evidentiary objections, because an objection by one attorney to evidence or testimony protects only that attorney's client.

Proposed findings and conclusions are a crucial opportunity to marshal evidence supporting the client's position. They may also help to preserve issues for appeal. Proposed findings of fact must reference the evidentiary source(s). The Supreme Judicial Court has issued guidelines for proposed findings for these cases that are available on the CPCS website.

## **7. SETTLEMENT**

Counsel should participate in settlement negotiations to seek the best result possible for the client consistent with the client's interests and directions to counsel. Counsel should consider utilizing available settlement resources, including mediation, to narrow contested issues or reach global resolution. Prior to entering into any negotiations, counsel shall have sufficient knowledge of the strengths and weaknesses of the client's case, or of the issue under negotiation, to enable counsel to advise the client of the risks and benefits of settlement.

**Commentary:** From the time of appointment, and at every stage of the proceeding, counsel should be aware of the possibility of settlement opportunity and should discuss such opportunity with the client. Counsel should, consistent with the client's interests and direction, at strategically appropriate times, proffer and respond to settlement offers

without compromising the client's position in the proceeding. Counsel should participate in the settlement process for or with the client to the extent that the client wishes or that it is advisable to protect the client's interests. Counsel must, however, continue to move the litigation forward for the benefit of the client in the event that settlement fails.

Counsel for a child client should keep in mind that a negotiated resolution of these proceedings often serves the child's needs for finality, security and family contact, and should encourage settlement whenever such resolution is consistent with the child's interests and goals.

## **8. POST-JUDGMENT REPRESENTATION**

Counsel shall inform the client of the court's decision and act in accordance with [Section 1.5](#). Counsel shall discuss with the client his or her post-judgment and appellate options regarding an adverse decision from the court. Counsel shall continue to represent the client in accordance with [Section 1.3](#).

*Commentary:* A child's position may change after trial. It is critical for child's counsel to inform the child of the court's decision and determine whether the child's position requires counsel to challenge all or part of the judgment.

### **8.1 Appeals**

- a. If the client elects to appeal, counsel shall file a timely notice of appeal; file motions for appointment of appellate counsel and waiver of fees and costs related to the appeal; and ensure that the trial court clerk's office has ordered the appropriate transcripts. For parent clients, counsel shall take such steps as are necessary to obtain the client's signature on the notice of appeal. If appropriate, counsel shall also request a stay of the judgment pending appeal. Counsel for the appellee shall monitor appellant's compliance with appellate deadlines.
- b. Counsel shall submit necessary documentation to CAFL for the assignment of appellate counsel immediately upon the filing of the appeal, even if counsel is appellate certified. If counsel is appellate certified and wishes to keep a case on appeal, counsel must seek the written permission of the Director of Appellate Panel or their designee. If a staff trial attorney wishes to represent the client on appeal, they must obtain permission from the Managing Director or their designee.
- c. Counsel shall represent the client on all appellate matters until appellate counsel files an appearance.
- d. Counsel shall fully cooperate with the client's appellate counsel, and shall:

- i. promptly respond to appellate counsel's phone calls, emails, and other communication.
- ii. promptly provide appellate counsel with:
  - (a) contact information for the client;
  - (b) the docket, copies of appeal-related pleadings, post-judgment pleadings, judgments, decrees, and findings/conclusions; and
  - (c) notices of any hearings in the trial court.
- iii. as soon as practicable, provide appellate counsel with copies of trial counsel's entire client file, including but not limited to all exhibits and pleadings, as well as the DCF file, counsel's own case notes, and all correspondence. After consultation with appellate counsel, counsel may instead provide appellate counsel with originals of the documents listed above, and appellate counsel shall make copies of same for counsel.

**Commentary:** See Mass. R. Prof. C. 1.15A for more guidance on the contents of the client's "file" that must be provided to the client or appellate counsel. Counsel is not required to turn over internal conflict check records or billing records to appellate counsel.

Appellate counsel is required under CAFL Appellate Performance Standard 3 to view and copy the file at the trial court clerk's office. However, appellate counsel may work far from the courthouse, making additional trips to the clerk's office impracticable. If, after initial review of the trial court file, appellate counsel determines that other documents are needed, appellate counsel may ask trial counsel to obtain or copy records from the case file at court. Trial counsel should comply with reasonable requests of this sort in a timely fashion.

- e. If counsel and appellate counsel for a child have different positions for the client, they shall attempt to reconcile their differences and reach a unified position. If such attempts are unsuccessful, counsel shall contact the CAFL Trial Panel Director for instruction. Counsel shall not file any motions regarding the disputed position until a positional conflict with appellate counsel has been resolved.
- f. If appellate counsel informs counsel of an intention to file a motion or brief claiming ineffective assistance of counsel (IAC), counsel shall:
  - i. continue to cooperate fully with appellate counsel, as set forth in section (d) above;
  - ii. immediately withdraw from the representation and seek appointment of new trial counsel for the client. If counsel believes that immediate withdrawal would be harmful to the client, counsel shall contact the CAFL Trial Panel Director for instruction. CAFL administration may, in

extraordinary circumstances, permit counsel to continue the representation despite the IAC claim. To remain on the case, counsel must obtain the written approval of the CAFL Trial Panel Director and the CAFL Appellate Panel Director.

**Commentary:** After withdrawal from the case, counsel may keep their NAC open in order to bill for work done related to any appeal. If counsel has already closed their NAC, counsel should submit a “Request to Re-open NAC” form to the CAFL Trial Panel Support Unit.

- iii. upon request by appellate counsel, provide, in a timely manner, a signed affidavit detailing the facts relevant to appellate counsel’s IAC claim, including counsel’s actions, strategic decisions, and any reasons therefor.
- iv. upon request by appellate counsel or if subpoenaed by other counsel or the court, appear and testify at a hearing on appellate counsel’s post-trial motion alleging IAC.
- v. not communicate with any other counsel or party regarding the representation in any way that violates the client’s attorney-client privilege or harms the client’s interests, unless permitted to do so by the client or appellate counsel or ordered by the court.
- vi. not argue on their own behalf at a hearing on the post-trial motion alleging IAC.

**Commentary:** Counsel may be called as a *witness* at a hearing on an IAC claim, but counsel is not a *party* to the proceeding and has no independent right or standing to be heard. Thus, counsel does not have a position adverse to the (former) client in a motion for a new trial. Counsel must not oppose the motion, “defend” themselves at a hearing on the IAC claim, “volunteer” confidential information to anyone other than appellate counsel, or take a position in any way adverse to the client. Counsel may, under formal questioning from appellate counsel, other counsel, or the court, answer questions relevant to the IAC claim. But even during testimony, counsel cannot disclose confidential information unless the information is solicited by appellate counsel or compelled by court order. See Commonwealth v. Brito, 390 Mass. 112, 119 (1983) (attorney must maintain confidences that are not related to IAC claim); Commonwealth v. Woodberry, 26 Mass. App. Ct. 636, 636-40 (1988) (when testifying at hearing on motion for new trial based on IAC, counsel may only reveal confidences relevant to IAC allegations); Commonwealth v. Goldman, 395 Mass. 495, 497 n. 2 (1985) (suggesting that counsel should not disclose in camera the substance of attorney-client communications without the client’s consent); Dorothy Anderson, Asst. Bar Counsel, *When Your Client Sues You, Are Your Lips Still Sealed?*, Mass. BBO (Sept. 2003), available at: <https://bbopublic.blob.core.windows.net/web/f/lips.pdf> (“[I]f a client accused prior counsel of inattention or neglect, for the purpose of obtaining some relief from a court or administrative body . . . the accused attorney would be permitted to reveal confidential information to the extent necessary to respond to those allegations. . . . [A]n attorney in this situation should be cautious not to gratuitously reveal confidential

information merely to protect her own reputation.”).

Counsel must provide a factual affidavit to appellate counsel if appellate counsel so requests. This affidavit is not intended to extract “condemning” information about trial counsel or trial counsel’s conduct; counsel need not (and ought not) admit in the affidavit that they were wrong, incompetent, or ineffective. Rather, this affidavit concerns the facts – what did counsel do, what did counsel not do, and why did counsel take certain actions (or not take those actions)? To illustrate, an affidavit might address why counsel did not call a certain witness favorable to a parent client. The affidavit might include counsel’s efforts to contact and interview the witness, what the witness told counsel, and why counsel decided not to call that witness. The affidavit would not include any declaration that counsel was wrong or ineffective in making the decision. The affidavit-drafting process is just that – a process. Appellate counsel may send counsel an initial draft, and counsel would then be expected to edit that draft and send it back to appellate counsel. Counsel should only sign an affidavit that contains facts that are true to the best of counsel’s knowledge.

- g. If counsel is staff, counsel shall contact and obtain instruction from the CAFL Managing Director instead of the CAFL Trial Panel Director for the purposes of this Standard.

## **8.2 Post-Judgment Hearings, Reviews and Motions**

Following issuance of the judgment, counsel shall continue to represent the client in accordance with [Sections 1.3](#) and [1.5](#). Counsel shall also continue to represent the client (except for parents where parental rights have been terminated) at all appropriate administrative and foster care reviews. Where appellate counsel has been assigned, trial counsel shall notify appellate counsel of any activity in the trial court and any other significant event.

*Commentary:* Counsel continues to represent the client in the trial court when an appeal is taken. Counsel should not withdraw from the case just because an appeal is filed. After the appeal has been docketed in the Appeals Court, trial counsel may not file certain pleadings in the trial court which seek to affect the judgment absent leave of the appellate court. Counsel should notify appellate counsel of the need to proceed in the trial court and request that appellate counsel seek the appropriate leave of court.

## **8.3 Cessation of Representation**

- a. **Conclusion of case.** In the event the case concludes by the occurrence of one of the events described in [Standard 1.5](#) above, counsel shall notify the client and explain the meaning and ramifications of case conclusion.
- b. **Withdrawal from case.** In the event counsel seeks to withdraw from a case,

- c. counsel shall move the court for successor counsel for the client. Counsel shall provide the client with a copy of the motion to withdraw and notice of the hearing. Counsel shall, to the extent practicable, avoid disclosing confidential information and information adverse to the client in any motion to withdraw or hearing thereon. If successor counsel is named, counsel shall cooperate with successor counsel. In the event the court determines not to appoint successor counsel, counsel should advise the court and opposing counsel of the client’s address, unless otherwise directed by the client.

*Commentary:* In situations where counsel is withdrawing at the client’s request, counsel should advise the client that the court may decline to appoint substitute counsel unless the client can demonstrate good cause. See *Adoption of Olivia*, 53 Mass. App. Ct. 670, 673-675 (2001). It is very important that pro se clients receive the same pleadings and notices as are served on counsel. If counsel is withdrawing from a case involving domestic violence or presenting other safety concerns for the client, counsel may not wish to disclose the client’s address to other counsel or other pro se litigants. In such circumstances, counsel should, contemporaneously with the motion to withdraw and (if possible) after discussion with the client, (a) file a motion to impound the client’s address and (b) unless the client provides the court with the completed appointment of agent form, ask the court and remaining counsel to provide the client with notices of any hearings scheduled and copies of any pleadings filed or orders entered.

**d. Striking counsel’s appearance.**

In the event the court strikes counsel’s appearance and no successor counsel is appointed, counsel should advise the court and opposing counsel of the client’s address, unless otherwise directed by the client.

*Commentary:* Counsel should follow the commentary set forth in [Standard 8.3\(b\)](#) above.

**O. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD REQUIRING ASSISTANCE CASES**

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## 1. GENERAL PRINCIPLES OF REPRESENTATION

### 1.1. Role of Counsel

- a. The role of counsel in Child Requiring Assistance (“CRA”) cases is to be an advocate for the client within the scope of counsel’s appointment. Counsel shall determine the client’s position and goals, and zealously advance them. Counsel must explain to the client the nature of the proceedings, the client’s rights, and attorney’s responsibilities.
- b. The role of counsel is also to be an advisor and counselor. This involves explaining the likelihood of achieving the client’s goals and, where appropriate, identifying alternatives for the client to consider. In addition, counsel should explain the known risks inherent in advancing the client’s position.
- c. Counsel has an obligation to provide each client with the time and resources necessary to represent them competently.

**Commentary:** To provide competent representation in CRA matters, counsel must be familiar with G.L. c. 119, particularly §§ 39E-39L, Juvenile Court Standing Order 3-21 (providing CRA guidance to juvenile court judges, clerks-magistrate and probation officers), and relevant case law. Counsel should also be familiar with the roles and responsibilities of the school department, the Department of Children and Families (“DCF”), the Department of Public Health (“DPH”), the Department of Developmental Services (“DDS”), the Department of Youth Services (“DYS”), and the Department of Mental Health (“DMH”), as well as the laws and regulations that govern them.

Counsel must explain to the client in detail the nature of the proceedings and the client’s role in the proceedings. Specifically, counsel must explain the decisions the client needs to make (e.g., whether to challenge probable cause, enter into an informal assistance agreement, agree to an adjudication and/or disposition, testify at a hearing, or file an appeal) and the possible consequences of those decisions. Counsel must explain that decisions concerning legal strategy to achieve the client’s desired outcome are made by the attorney after consultation with the client. This includes deciding which motions to file, witnesses to call, questions to ask, and evidence to present. Before making these decisions, the attorney must consider the client’s input and explain to the client the factors the attorney considered in making these decisions.

Counsel should communicate, with the client’s consent, with any other attorney representing the client to ensure that all counsel have a mutual understanding of the client’s goals. In particular, counsel representing child

clients in CRA cases who also have pending delinquency or youthful offender cases should ensure that they are working in concert with delinquency counsel, consistent with the client's position.

- d. Counsel for a child owes the same duties of undivided loyalty, confidentiality, zealous advocacy, and competent representation as are due to an adult client. *See* Mass. R. Prof. C. 1.1, 1.2, 1.3, 1.6, 1.7-1.9, 1.14.

**Commentary:** Counsel for a child should, regardless of any alignment of position between the child client and other parties, develop their own theory and strategy of the case and ensure that the child client has an independent voice in the proceedings. Although the child client's position may overlap with the position of another party, counsel for the child should be prepared to present their client's position independently and to participate fully in all proceedings and case conferences.

## **1.2. Appointment of Counsel**

- a. Immediately after accepting an appointment, counsel shall contact their client to schedule an initial meeting. Counsel must also review the application for assistance, the probation file, and any other relevant documents, and file an appearance with copies to any other counsel and relevant parties, including school petitioner(s). Counsel should also inform probation officer(s) of their appointment, how to contact counsel, and let them know that counsel wishes to be present for future interviews with the client.
- b. Counsel shall decline the assignment if they are unable to provide the client with prompt and zealous representation, or if accepting the assignment will create a conflict or potential conflict of interest, or if counsel believes they will not be able to comply with the CAFL Performance Standards. If counsel declines an appointment, counsel shall give proper notice to the court.

**Commentary:** Counsel should not accept an assignment if they cannot begin working on a case promptly or are unable to appear in court on an assigned date and cannot arrange a continuance that is consistent with the client's interests.

Local practice may vary as to when counsel is assigned. If the assignment is made in advance of the first court event, counsel should contact the client as soon as possible to schedule an in-person meeting.

It is counsel's responsibility to be aware of the caseload limits of the Committee for Public Counsel Services ("CPCS") found in the CPCS Manual for Assigned Counsel Chapter 5. Counsel should not accept any assignment which will cause them to exceed these limits.

### 1.3. Duration and Scope of Representation

- a. *Duration of Representation.* Except as provided in paragraph (b), an assignment at the trial level concludes upon the earliest of the following:
  - i. The CRA petition has been dismissed and the time frame for an appeal has passed;
  - ii. Counsel has withdrawn for all purposes;
  - iii. The child has turned 18 in DCF custody and has decided not to continue in DCF care;
  - iv. The court has stricken counsel's appearance or the appearance of the client, and no appeal has been filed regarding such action;
  - v. An appeal of an order under (i) or (iv) reaches its conclusion; or
  - vi. The subject child or the client has died.

In any case where appellate counsel has been appointed, that appointment shall not terminate trial counsel's ongoing responsibilities to the client in proceedings before the trial court.

**Commentary:** In accordance with the client's position, counsel should ensure that the case is dismissed on or immediately after the child turns sixteen for school-based CRA petitions or eighteen for other CRA petitions, or after 390 days from entry of the initial dispositional order under G.L. c. 119, § 39G(c). If the child client wants to remain in the care of DCF upon turning 18, counsel shall ensure that DCF offers a voluntary placement agreement to the client in a timely manner prior to the child's 18<sup>th</sup> birthday and that a "permanency young adult" ("PYA") matter is filed in court, and should accept the assignment for the young adult on the PYA case whenever possible (private counsel will receive a new Notice of Assignment of Counsel).

- b. *Collateral Representation.* Clients occasionally require legal assistance in proceedings before the Probate and Family Court, District Court or Juvenile Court on matters other than, but integrally related to, the CRA proceeding. Such matters, which may arise before or after the start of the CRA proceeding, include, but are not limited to, divorce, custody, guardianship and paternity proceedings. Private counsel appointed to represent a client in a CRA proceeding may, with written permission from the CAFL Trial Panel Support Unit, bill CPCS for representation of that client in collateral proceedings. CAFL staff counsel must seek written permission from the Deputy Chief Counsel, Managing Director, or their designee.

Counsel may, without seeking permission, bill CPCS for representation of a client at a DCF fair hearing, school manifestation determination review hearing, school disciplinary hearing or appeal, or special education meeting concerning the child who is the subject of the CRA proceeding. Counsel must receive written permission to bill CPCS for representation of a client in an appeal of a DCF fair hearing to Superior Court, or an appeal of a special education decision to the Board of Special

## Education Appeals (“BSEA”).

Authorization for any collateral representation ends at the earlier of (i) final judgment in the collateral matter, or (ii) the occurrence of any event set forth in paragraph (a) above. Counsel cannot bill CPCS for the appeal of any collateral matter without express written permission of the CAFL Trial Panel Support Unit or Deputy Chief Counsel, Managing Director or their designee. Counsel who request permission to represent a client on a collateral matter must also give notice to all other counsel on the CRA matter, as other counsel may wish to appear in the collateral matter.

**Commentary:** Collateral matters in a CRA cases could include petitions for change of name if a child client is transgender and ensuring their name and pronouns are correct is integral to the CRA case.

- c. *“One-Attorney” Statute.* Generally, counsel appointed in a CRA matter must represent the client in a pending or later-filed child welfare proceeding if so certified. If other counsel has already been appointed to represent the client in a pending child welfare proceeding and is certified to take CRA cases, the attorneys shall consult and determine which attorney will continue to represent the client in both matters and which attorney will move to withdraw. In the event counsel cannot agree, they shall contact the CAFL Trial Panel Support Unit or their Attorney-in-Charge (AIC) for assistance. In the event the CRA attorney is not certified to take a later-filed child welfare proceeding, the newly appointed attorney shall represent the child client, if so certified, in both proceedings unless an exception has been made by the CAFL Trial Panel Support Unit or AIC.

**Commentary:** General Laws c. 211D, § 6B provides that, at any time, only one assigned or appointed attorney will be paid to represent a client who is a party to any Care and Protection matter, Probate and Family Court matter, or CRA proceeding. The CPCS Chief Counsel may grant an exception to this rule in certain circumstances, such as the pendency of separate actions in distant counties. This statute does not authorize an attorney to accept an appointment in any matter which requires a CPCS certification they do not hold. Counsel must request an exception in writing to the CAFL Trial Panel Support Unit.

### 1.4. Conflicts of Interest

Counsel must be alert to and avoid all conflicts of interest that would impair their ability to represent a client. The presence of a conflict may require counsel to withdraw from representing one or more clients. In such event, counsel shall request that the court appoint successor counsel, ensure that successor counsel is, in fact, appointed, and cooperate fully with successor counsel to the extent required by the Massachusetts Rules of Professional Conduct. *See* Mass. R. Prof. C. 1.4, 1.15A, 1.16.

**Commentary:** In some cases, it may be possible for counsel to represent siblings

in their separate CRAs, but counsel must be careful to avoid potential conflicts among siblings. A conflict exists if siblings have different positions on any issue or if their legal or factual defense is incompatible. Child's counsel should not accept any role other than counsel (e.g., Educational Surrogate).

A conflict may also arise where an attorney is appointed to represent more than one parent. In situations where there are allegations of domestic violence or the parents' positions are otherwise not aligned, counsel may not represent both parents.

Counsel should also be cautious of the potential for a conflict of interest in cases where the interests of the client are closely aligned with another, unrepresented person, (e.g., between a child and a relative caretaker). Counsel should never agree to represent such other person. Child's counsel should also be aware of the conflict inherent in accepting any role other than counsel; for example, counsel should not act as a parent proxy in signing an Individualized Education Plan.

In accepting assignments, former DCF attorneys, assistant district attorneys, school attorneys, or other former government attorneys should be mindful of the rules regarding conflicts of interest and successive government and private employment. See Mass. R. Prof. C. 1.7-1.11. Lawyers who practice separately in an office-sharing arrangement should similarly be mindful of the conflict of interest rules and other rules set forth in Commonwealth v. Allison, 434 Mass. 670 (2001), and other appellate cases.

Counsel must be alert to the potential for conflict not only at the time of appointment but throughout the representation. A client's position may change as time passes, resulting in a conflict where none existed previously. A conflict may also arise if counsel receives confidential information from one client that the client does not wish to be disclosed, but disclosure would advance the interests of the other client. See Mass. R. Prof. C. 1.7, cmt. [12C].

### **1.5. Communications with Client**

In all CRA cases, counsel must maintain sufficient contact with the client to establish and maintain an attorney-client relationship that will enable counsel to keep abreast of the client's challenges, successes, interests and needs, and of the client's position in the action.

- a. Immediately upon receipt of notice of the assignment, counsel shall take appropriate steps to locate their client. Counsel shall inform the client of the assignment and meet with the client as soon as practicable. To the extent possible, the initial meeting should take place sufficiently prior to any upcoming court hearing to permit counsel to prepare for the hearing. As soon as practicable, and to the extent possible given the client's age and abilities, counsel shall explain to the client the nature of the court proceedings and applicable law, the role of counsel, and the existence of and limits to privileges covering the client's communications with counsel, therapists, social workers, and other relevant

- b. individuals. Counsel shall also ascertain the client's circumstances, interests, goals and position in the proceeding. Where counsel is unable to communicate effectively with the client because of mental illness, developmental delay, disability, or language barriers, counsel shall take whatever steps are necessary including obtaining expert assistance or an interpreter, to ensure that they are able to communicate with the client and that the client understands the proceedings.
- c. At a minimum, counsel shall meet with a **child client** every three months, except under extraordinary circumstances. Counsel shall meet with the child client as necessary to provide competent representation to the client, to ascertain the child's circumstances, interests, needs, and positions, to inform and advise the client about the proceedings, as appropriate, and to maintain an ongoing attorney-client relationship with the child.

**Commentary:** In order to provide competent representation, child's counsel should meet with the child in the child's environment whenever possible to better understand the child's personal context. Viewing the child in their environment is also an important part of counsel's required, ongoing investigation (*see* Standard 3.1) and can illuminate whether a client is receiving the services necessary to achieve their goals. *See* Standard 4. If counsel is aware, particularly in cases where the parent is the petitioner, that meeting with the child client in the home could create a difficult situation for the client, counsel may choose to meet with the client outside the home. Counsel should ensure that the attorney-client privilege will be protected, so should be wary of meeting in public places. For example, counsel could consider asking to meet the client at school in a private room, although counsel should also be mindful of disrupting the client's school day. Counsel should respect the client's wishes about where meetings will occur. Given the frequency of CRA hearings, it is foreseeable that some of the client meetings will occur in the courthouse, although courthouse meetings should not be the only client contacts.

- d. Except under extraordinary circumstances, counsel **must promptly meet in-person** with their **child client**, irrespective of the child's age, when they become aware of, or in advance of, any the following:
  - i. When the child asks to meet counsel in person;
  - ii. To prepare the child client for court appearances that counsel is aware will likely be contested;
  - iii. When the place where the child is living has changed, regardless of who has custody;
  - iv. When the place where the child is living is about to change and the child is capable of expressing a preference about the change, but counsel and the client have not previously discussed it;
  - v. When the child has been psychiatrically hospitalized or hospitalized due to an injury or serious illness;

- vi. When the child is facing or is at risk of facing delinquency charges;
- vii. If the child is the victim of a crime; or
- viii. If a 51A involving the child's residence has been newly supported or a question has been raised regarding the appropriateness of the child's residence that warrants investigation by the attorney, or if it seems likely that a care and protection case might be filed.

**Commentary:** If the child is facing or is at risk of facing a delinquency case and counsel learns that police wish to interview the child, counsel should contact the Trial Panel Support Unit or their AIC to request a delinquency attorney be appointed to represent the child immediately. Similarly, if there appears to be a risk of a care and protection case, counsel should contact the Trial Panel Support Unit or their AIC to request a care and protection attorney be appointed. In either instance, if counsel is dually certified, counsel may seek permission to handle both cases.

- e. If a child client can express a preference, counsel ***must promptly contact the client*** in an age-appropriate and developmentally appropriate way when counsel becomes aware of any of the following:
  - i. Any upcoming hearing, including but not limited to informal assistance reviews, fact-finding hearings, conferences, dispositional hearings, dispositional reviews, permanency hearings, and substantive motion hearings; or
  - ii. The place where the child is living is about to change; or
  - iii. There is a request for out-of-home placement; or
  - iv. A change in the child's school; or
  - v. Any request for an evaluation, including but not limited to court clinic and school-based assessments; or
  - vi. A significant school-based issue (repeated absences, discipline, failure of the school to provide necessary services, etc.);
  - vii. If counsel learns after the initial interview the child client is not a U.S. citizen; or
  - viii. A separation of the child from siblings who were placed together.

In all cases counsel must maintain sufficient contact with the client to establish and maintain an attorney-client relationship that will enable counsel to stay informed of the client's position and goals and to keep the client informed of significant developments in the case. Counsel must advise the client of the potential consequences of their positions.

**Commentary:** Establishing and maintaining an appropriate attorney-client relationship with the child client is the foundation of effective representation. It is often more difficult to develop a relationship and trust with a child client than

with a parent client. Meeting with the child regularly allows counsel to develop a relationship with the client and to assess the child's circumstances. The child's circumstances, interests, needs and positions may change over time. Counsel cannot be fully informed of such changes without developing a relationship through frequent contacts. Accordingly, counsel must meet with child clients at least every three months. Counsel for a child must also meet with or contact the client upon the occurrence of certain events in the child's life or in the child's case as described above. This will ensure that counsel is fully informed of the client's circumstances, interests, needs, and positions as the case proceeds.

Under extraordinary circumstances, however, counsel for a child may not be able to meet with the client as required above. For example, the child may be "on the run" and their whereabouts are unknown or there may be strong evidence that the child will be adversely affected by meeting with counsel, the child may refuse to meet with counsel, or the child is placed at a distance that makes it impracticable to meet in the situations listed above. Where these circumstances exist, counsel should document any variance from the performance standard, as well as their efforts to meet with or contact their child client, in their case file. Please note that when distance is the issue, counsel must still meet with child clients virtually.

Where the performance standards require contact with the client but do not require that it be in-person, for many older child clients this communication might be possible using Zoom, FaceTime, or other video platforms or through phone calls or text messages. Counsel should assess what type of contact is appropriate given the nature of the issue, the developmental level and maturity of the client, the client's ability to effectively engage with counsel, the client's preferences, and any privacy issues. Younger clients may not be able to communicate effectively with counsel in these ways and would instead still require an in-person meeting. Counsel should be mindful of the risks associated with communicating with child clients through letters, email, and text messages. Children may not receive such communications or may not be the only ones to read such communications. This places counsel's work product and attorney-client privilege at risk.

- f. Counsel shall continue to meet and communicate with the client, whether parent or child, as necessary to provide competent representation to the client, to be informed of the client's position and circumstances and to inform and advise the client about the proceedings and potential outcomes. If a client is in DCF custody, in the custody of a third party, involuntarily committed, or incarcerated and wishes to attend a hearing, counsel shall make all necessary arrangements including requesting a court order or writ of habeas corpus to ensure the client's presence at the hearing. If the court issues an adverse ruling, counsel should consult section 9.1 on Appeals.
- g. Counsel shall explain the result of all court hearings and administrative proceedings to the client. If a judgment is adverse to the client, counsel shall explain the client's right to appeal the decision, the appellate process, including the time limits in which a notice of appeal must be

- h. filed, and any alternative post-judgment strategy that may be appropriate. Counsel shall also explain the process and availability of post-trial reviews, if applicable. If a final judgment is not adverse to the client, counsel shall ensure that opponents adhere to time limits and discharge other appellate responsibilities until appellate counsel files an appearance. In communicating the results of court hearings and administrative proceedings to a child client, counsel shall provide such information as is appropriate given the child's age, abilities and wish to be so informed.

**Commentary:** The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning, implications and consequences of legal proceedings. A client may not understand the legal terminology and, for a variety of reasons, may choose a particular course of action without fully appreciating the implications. With a child the potential for misunderstanding may be even greater. Therefore, the child's attorney has additional obligations based on the child's age, level of education, developmental stage, and language skills. There is also the possibility that, because of a particular child's developmental limitations, counsel may not completely understand the child's responses. Therefore, child's counsel must learn how to ask developmentally appropriate questions and how to interpret the child's responses. The child's attorney may work with social workers or other professionals, both within the defense team and from outside agencies, to assess a child's developmental abilities and to facilitate communication. In addition to initiating contact with the client as described above, counsel should respond promptly to telephone calls, letters, and other inquiries from the client.

#### **1.6. Determining and Advocating a Child Client's Position**

- a. Counsel shall elicit a child client's preferences, advise the child client, and provide them with guidance.

**Commentary:** Rule 1.14(a) of the Massachusetts Rules of Professional Conduct requires that "[w]hen a client's ability to make adequately considered decisions in connection with a representation is diminished [because of minority], the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." This requirement "is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters." Mass. R. Prof. C. 1.14, cmt. [1].

Counsel must explain the proceedings to a child client in a developmentally appropriate manner and give the child client enough information to help them understand the proceedings and formulate a litigation position. Counsel must be able to ask developmentally appropriate questions and interpret the client's responses in a way that provides a clear understanding of the child client's preferences.

In eliciting the child's preferences, counsel should be aware of and understand

the factors that influence the child’s decision-making process. In addition to communicating with the child client as discussed in Section 1.5 above, counsel should review records and consult with appropriate professionals, both within the defense team and from outside agencies, and others with knowledge of the child, such as kin. Counsel also may find it helpful to observe the child’s interactions with parents, foster parents, and other significant individuals. This information will help counsel to better understand the child’s perspective, priorities, and individual needs, and will assist counsel in identifying relevant questions to pose to the child and advising the client.

Counsel should advise the client of the potential consequences of particular positions. Counsel may express an opinion concerning the likelihood of the court or other parties accepting particular positions. Counsel may inform the child of an expert’s recommendations germane to the issue. Counsel should recognize that the child may be more susceptible to the lawyer’s influence than some adult clients and should ensure that the child’s expressed preferences reflect their actual position.

- b. Counsel shall represent a child client’s expressed preferences regarding a matter where:
  - i. counsel reasonably determines that the child client is able to make an adequately considered decision with respect to that matter; or
  - ii. counsel reasonably determines that the child client is not able to make an adequately considered decision with respect to that matter, but achieving the client’s expressed preferences would not place them at risk of substantial harm.

***Commentary:*** The vast majority of CRA child clients are able to make adequately considered decisions with respect to their cases. A client’s expressed preference will, in nearly all CRA cases, dictate counsel’s position. Counsel should look to the client’s decision-making process and not to the merits of the decision in assessing whether it is adequately considered.

Rule 1.2 of the Massachusetts Rules of Professional Conduct requires counsel to “seek the lawful objectives of his or her client.” Only if the lawyer determines that the client is incapable of making adequately considered decisions in connection with the representation, may counsel deviate from this requirement, and even then counsel must “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” See Mass. R. Prof. C. 1.14.

A child’s ability to determine his or her own position may depend upon the particular matter to be determined, or the circumstances involved at the time. Thus, a child may be able to make some decisions and not others. For example, counsel may reasonably determine that the child is capable of deciding that he or she would like to have visits with a sibling but is not capable of deciding whether he or she should return home or remain with relatives on a permanent basis. Counsel should document what position a client expresses, and any reasoning for

counsel's deviation from representing the client's expressed position. Additionally, as time passes and the child matures, he or she may become more capable of directing the representation.

If counsel has any doubt about the child client's capacity to direct the representation, counsel must consider whether there is a legal basis for a CRA case, or whether counsel should seek dismissal and an alternate means of obtaining services for the client that is more appropriate. If a child client truly cannot make an adequately considered decision, then counsel should consider whether the CRA statute can apply to that child at all, since the hallmark of a CRA case is willful behavior. Millis Pub. Sch. v. M.P., 478 Mass. 767, 775 (2018). Counsel should consider moving to dismiss the case, while being mindful of the obligations of privilege and confidentiality, and without damaging the client's position by undermining their capabilities to the other parties and stakeholders.

- c. If counsel determines that a child client is not able to make an adequately considered decision regarding a matter *and* achieving the child client's expressed preferences would place the client at risk of substantial harm, counsel must choose one of the following options:
  - i. advocate the child client's expressed preferences regarding the matter; or
  - ii. inform the court of the child client's expressed preferences and determine what the child client's preferences would be if they were able to make an adequately considered decision regarding the matter and represent the client in accordance with that substituted judgment determination.

**Commentary:** It is extremely rare and only under extraordinary circumstances that counsel may substitute judgment for their client in a CRA proceeding. Determining what position to take when a child client can verbalize a preference but counsel believes that the client is not capable of weighing the various options or understanding the consequences of pursuing particular positions is the most difficult part of representing children with diminished capacity. Counsel should consult Rule 1.14 of the Rules of Professional Conduct. If an incompetent child's expressed preferences will not subject the child to a risk of substantial harm, counsel is obligated to pursue the client's wishes. Mass. R. Prof. C. 1.14(b) provides that only when the client is incompetent and the attorney believes the client is at risk of substantial harm, may counsel take certain steps to protect them.

A substituted judgment determination is not the same as determining the child client's best interests. When conducting a substituted judgment analysis counsel must determine what the child client would decide if they were able to make an adequately considered decision. If the child client is able to communicate a preference but is not capable of making an adequately considered decision, counsel must consider the client's preferences in making a substituted judgment determination. For further discussion on this topic, counsel should review the

Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases, and in particular the commentary to section 1.6(c).

In assessing the child client's ability to make adequately considered decisions, it is the quality of the client's decision making – not the wisdom of the decision – that is determinative. For example: the decision of a 12-year-old to remain home with a parent who is abusing or neglecting them but who is not abusing or neglecting younger children in the home may not be in the best interest of the client but may be adequately considered. The child client may not want to trigger the removal of the younger children or risk being placed in an unknown foster home or program. Therefore, they may be competent to make that decision.

Counsel should consider the following factors: the child client's ability to communicate a preference, whether the client can articulate reasons for the preference, the decision-making process used by the client to arrive at the decision (e.g., whether it is logical, whether it is consistent with their previous positions, whether they appear to be influenced by others, etc.); and whether the client appears to understand the consequences of the decision. See Mass. R. Prof. C. 1.14, cmt. [6]. Counsel must take into account the individual child client's unique circumstances.

In determining whether a child is able to make an adequately considered decision, counsel may wish to seek guidance from appropriate professionals and others with knowledge of the child, including an expert. Counsel may consider the following factors: the child's ability to communicate a preference, whether the child can articulate reasons for the preference, the decision-making process used by the child to arrive at the decision (e.g., is it logical, is it consistent with previous positions taken by the child, does the child appear to be influenced by others, etc.); and whether the child appears to understand the consequences of the decision. See Report of the Working Group on Determining the Child's Capacity to Make Decisions, 64 *FORDHAM L. REV.* 1339 (1996).

If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel must represent the child's expressed preferences regarding that matter, even if the attorney believes the child's position to be unwise or not in the child's best interest. Requesting the appointment of a guardian ad litem in such cases is contrary to the Rules of Professional Conduct. Of course, the lawyer does have a counseling function and should advise the client of the potential consequences of his or her position. However, the child's attorney should recognize that the child may be more susceptible to the lawyer's influence than some adult clients and should ensure that the decision the child ultimately makes reflects his or her actual position.

- d. In the highly unlikely event that a child client in a CRA case is incapable of verbalizing a preference, counsel shall consult section 1.6 of the Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases.

- e. **Commentary:** If counsel believes the position chosen by the incompetent client is wholly inappropriate or could result in serious injury to the child, the ethical issues are extremely difficult. While counsel of course has a counseling function and should advise the client of the potential consequences of their position, as in the comment above, counsel must recognize a child client's potential susceptibility to the lawyer's influence. If the client cannot be persuaded to change their position, counsel should review the commentary to Standard 1.6(d) of the Child Welfare performance standards.

Counsel should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child client chooses not to express a preference on a particular matter, counsel should determine if the child client wishes the attorney to take no position in the proceeding, or if the client wishes the attorney or someone else to make the decision for them. In either case, the attorney is bound to follow the client's direction.

Counsel should also be mindful that if a child is incapable of verbalizing a preference, the child is likely also incapable of the willful conduct which is a prerequisite for a Child Requiring Assistance case and should consider seeking a dismissal. See Commentary to Standard 1.6(b), supra.

### **1.7. Determining and Advocating an Adult Client's Position**

Counsel shall advocate for an adult client's stated position and goals in the proceeding and follow the client's direction throughout the course of the case. Consistent with the Rules of Professional Conduct, counsel should also advise the client and provide guidance regarding the law and the potential outcomes of the client's decisions. It is counsel's responsibility to make strategic legal decisions in the case to advance the client's position.

**Commentary:** Counsel should be mindful that parents in CRA cases retain considerable decision-making power for their children and should assist them in exercising rights, in accordance with the client's direction, such as those pertaining to education and medical treatment. See 110 C.M.R. § 11.02.

### **1.8. Privilege, Confidentiality, and Attorney Work Product**

Consistent with the client's position and goals, counsel shall seek to protect from disclosure privileged communications, confidential information, and attorney work product. Counsel shall fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. Counsel shall not disclose a child client's private communications to their parent, legal custodian, or any other person without the express permission of the child client or as otherwise permitted under Rule 1.6(a) or 1.6(b) of the Massachusetts Rules of Professional Conduct. Counsel must be prepared to respond to any attempt by another party to waive or invoke the client's privilege or right to confidentiality. See generally Mass. R. Prof. C. 1.6 and

1.14(c). Counsel may request a guardian *ad litem* for the limited purpose of making decisions regarding waiver of therapeutic privilege and the waiver or exercise of legal rights in other proceedings (e.g. accepting a plea in a delinquency case) on behalf of a child client.

**Commentary:** Counsel shall take whatever steps are necessary to protect the client's privileges and right to confidentiality promptly following appointment. Protecting a client's interest in keeping private certain information and certain relationships is an important goal, independent of the effect disclosure would have on the proceeding.

Due to the confidential nature of the attorney-client relationship, counsel for the child may have information about a child that no one else has. For example, if the child has run away from home or placement, counsel may be the only person who knows the child's whereabouts. In this situation, DCF, the court, or the child's parents may attempt to pressure child's counsel to disclose the child's location.

There may be instances where a parent or guardian whose position is adverse to that of a child client may try to assert or waive the child client's privilege or right to confidentiality against their wishes. In that case, counsel for the child should advocate for the child's ability to control whether their privilege or right to confidentiality is exercised or waived. Counsel should be aware that if a child is in DCF custody, with some exceptions DCF can authorize the release of the child's confidential information, but best practice is for counsel to ask the child to sign the release as well.

Counsel should also be aware of when a child has authority to consent to the release of information, such as in the context of substance use disorder treatment, see 42 C.F.R. § 2.14, school records for children over the age of 14, see 603 C.M.R. §§ 23.02, 23.07(2), 23.07(4), certain medical information, see G.L. c. 112, §§ 12E, 12F, and orders to participate in court clinic evaluations, see Standard 1.9(c), infra.

Alternatively, if necessary and consistent with the child client's wishes, interests and goals, child's counsel should ask the court to appoint a guardian *ad litem* to make recommendations regarding the waiver of a therapeutic privilege for the child. Counsel must also take steps to protect attorney work product. See Standard 3.3, infra.

Attorney work product is most likely to need protection in the context of expert evaluations. While it may be difficult to preserve work product protection when seeking an evaluation of a child, counsel should still take precautions to avoid an evaluation being disclosed to an adverse party, such as DCF or probation, where possible.

Counsel should be mindful about: what records are shared with the expert since they may be required to turn over those records they relied upon to form their opinion; what collaterals the expert is permitted to contact, since those people

will know that an evaluation is being conducted; what information counsel shares with the expert in writing versus verbally; and informing experts to not write reports until instructed to do so by counsel.

### **1.9. Appointment of Guardian *ad litem* or for Court Clinic Evaluation**

- a. If the court is considering the appointment of a guardian *ad litem* to make recommendations regarding waiver of privilege for the child, counsel shall, consistent with the client's wishes, interests, and goals:
  - i. object to the appointment of the guardian *ad litem*; and
  - ii. seek to limit or clarify the role of the guardian *ad litem*.
  
- b. If the court appoints a guardian *ad litem*, counsel shall, consistent with the client's wishes, interest, and goals:
  - i. review the written order of appointment of the guardian *ad litem* to ensure that it is narrowly tailored to the purpose of the appointment;
  - ii. contact the guardian *ad litem*;
  - iii. revoke all authorizations for the release of confidential information, oppose motions seeking access to such information, and ensure that the court's order does not permit disclosures of such information;
  - iv. inform the client of the role of the guardian *ad litem*, including the consequences of cooperating with or failing to cooperate with the guardian *ad litem*, including risks of disclosing any abuse or neglect by a caregiver which could result in the filing of a 51A report or a care and protection case;
  - v. prepare the client for their interview with the guardian *ad litem*;
  - vi. prevent the guardian *ad litem* from speaking with the child if the child has delinquency charges pending, or is likely to have charges filed, or at a minimum, consult with the child's delinquency attorney if there is one, before any interview takes place;
  - vii. be present at any interviews of the client by the guardian *ad litem*, unless there are compelling reasons why counsel's presence would be unnecessary;
  - viii. assist the guardian *ad litem* in obtaining information that supports the client's position; and
  - ix. seek interlocutory review of the order appointing the guardian *ad litem* in appropriate cases.

**Commentary:** Counsel's presence at the guardian *ad litem*'s interview with the client not only provides support for the client but ensures that the client has the

opportunity to answer questions strategically and to present information, including the names of other persons to be interviewed, that is helpful to the client's position.

Counsel's presence can be invaluable in preparing cross-examination of the guardian *ad litem*. It also permits counsel, where appropriate, to advise the client not to answer specific questions or sign releases. These standards may also apply to interviews by other persons evaluating or interviewing the client, such as court-appointed special advocates ("CASA"), court clinicians, or probation officers.

If a child has delinquency charges filed, or counsel believes charges are likely to be filed, counsel may reach out to their Managing Director or the CAFL Trial Panel Support Unit to seek pre-arraignment appointment of a delinquency attorney, or at minimum a consultation. Similarly, if a care and protection case is reasonably foreseeable, counsel may reach out to their Managing Director or the Trial Panel Support Unit to seek pre-filing appointment of care and protection counsel. In either instance, if counsel is dually certified, counsel may seek permission to handle both cases.

- c. If the court is considering ordering the child client to participate in a court clinic evaluation, counsel shall, consistent with the client's wishes, interests, and goals, object to the order. If the court makes an order for a court clinic evaluation, counsel shall ensure that the court clinician gives the child a Lamb warning, see Commonwealth v. Lamb, 365 Mass. 265, 270 (1974), or if the clinician fails to do so, assist the client in asserting their privilege. If the client does not wish to participate in the evaluation, counsel shall assist them in following the proper procedure. Counsel shall also assist the client in asserting their privilege if the client has delinquency charges pending and the delinquency attorney advises that the client decline to participate in the evaluation. Counsel shall also discuss with the client the consequences of disclosing any abuse or neglect by a caregiver and the potential for a 51A report or care and protection case.

**Commentary:** Counsel should be familiar with the requirements of Commonwealth v. Lamb and In re Sheridan, 412 Mass. 599 (1992) for when a client is ordered to participate in an evaluation but wishes to assert their privilege. Counsel should also ensure that if the evaluation takes place, it is not released inappropriately, shared with anyone absent a court order releasing it to that person, and that a copy is not kept in the probation file. If the CRA is later expunged when the case is dismissed, no copy of the court clinic report should be available for any purpose.

If a child has delinquency charges filed but does not yet have an attorney, or counsel believes charges are likely to be filed, counsel may reach out to their Managing Director or the CAFL Trial Panel Support Unit to seek pre-arraignment appointment of a delinquency attorney, or at minimum a consultation. Similarly, if a care and protection case is reasonably foreseeable, counsel may reach out to

their Managing Director or the Trial Panel Support Unit to seek pre-filing appointment of care and protection counsel. In either instance, if counsel is dually certified, counsel may seek permission to handle both cases.

### **1.10. Missing Clients**

In the event a client's whereabouts are unknown, counsel shall take a position in court and administrative proceedings consistent with the client's last clearly articulated position or directive. In the absence of such information, or in the event circumstances have changed materially since the client last articulated a position, whether to take action on behalf of such client is a matter left to the discretion of counsel consistent with the Massachusetts Rules of Professional Conduct.

If counsel has never had contact with a child client, counsel should move to withdraw from the representation. If counsel is unable to contact an adult client after diligent efforts and the last clearly articulated position is no longer feasible, counsel should move to withdraw.

*Commentary:* Given the nature of runaway petitions, it is possible that child's counsel may be the only person who is in contact with the child client or knows their whereabouts, but counsel cannot share that information with DCF, the court, or the client's parent without the child client's consent as it would require the disclosure of a confidential client communication.

Counsel should be aware of the statutory limits on when a warrant of custodial protection is available and when it is not and should be prepared to argue against a warrant issuing when appropriate. Counsel should also be aware of what options a law enforcement officer has when executing one. Where a summons has not yet issued, counsel should consider objecting to the court issuing a warrant without first giving the child the opportunity to appear via summons because to skip this step is inconsistent with positive youth development and risks criminalizing and traumatizing the child, which the CRA reform statute intended to avoid.

### **1.11. Child's Counsel Interacting with Unrepresented Parents**

- a. Parents do not have the right to counsel at the preliminary hearing stage in a CRA proceeding unless the court is considering granting custody of the child to DCF. When consistent with the child client's position, counsel for the child should advocate for the court to allow the parent the opportunity to have an attorney appointed or to consult with a privately retained attorney.

If the parents or other legal custodian(s) are not represented by counsel, child's counsel shall follow Rule 4.3 of the Massachusetts Rules of Professional Conduct with respect to communications with unrepresented parties. Child's counsel should explain to a parent or other legal custodian that counsel represents the child only, and that it is not the role of counsel

to decide and advocate what the parent or other legal custodian believes to be in the child's best interests.

**Commentary:** Counsel must be cognizant of Rules 4.2 and 4.3 of the Massachusetts Rules of Professional Conduct regarding communications with any petitioner or witness who is either unrepresented or represented by counsel, but counsel is absent from the hearing. In furtherance of the child client's goals, it may be appropriate to inform a parent of all the possible outcomes of pursuing a petition including that the court may transfer custody against the parent's wishes or, if beyond the fact-finding stage of the proceedings, the court may continue the case despite the parent's(s') request for dismissal.

- b. When consistent with the child client's position and goals, child's counsel shall (i) ensure that the child's parents or other legal custodian are afforded notice and opportunity to be heard in court and other proceedings affecting the child, and (ii) advocate for timely appointment of counsel for the child's indigent parents or legal custodian prior to any hearing regarding custody of the child.

**Commentary:** See generally G.L. c. 119, §§ 39F and 39G. Under § 39F, parents are entitled to counsel at any hearing "regarding custody of the child." If consistent with the child's position and goals, counsel for the child should advocate for appointment of counsel for indigent parents. At any stage at which counsel foresees a transfer of custody would be possible, counsel may in accordance with the child's position, advocate for the appointment of counsel for indigent parents.

## **2. PRELIMINARY HEARING AND INFORMAL ASSISTANCE**

### **2.1. Determine Adequacy of the Petition**

Counsel shall review the petition and determine if there is probable cause and whether the petition is legally adequate to survive a motion to dismiss. Because CRAs are created statutorily, they are limited in who can petition the court, who can be brought before the court, and for what conduct. Counsel must be familiar with and review the statutory definition of each type of CRA case included in G.L. c. 119, §§ 21 and 39E, and compare it with the facts of each case.

Consistent with the client's wishes, counsel shall move to dismiss an application for assistance when it is filed by an unauthorized petitioner, it fails to allege the requisite elements of the CRA statute, or when the clerk's office has failed to inform the applicant that in lieu of filing the application the family can instead be referred to community-based services through a family resource center or provide the applicant with informational materials regarding CRA process (including potential dispositional orders).

If appropriate and consistent with the client's position, counsel should draft and

argue a motion to dismiss prior to the preliminary hearing.

**Commentary:** Section 39E of Chapter 119 states that a parent, guardian or custodian of a child may file a runaway or stubborn child application. A school district may file a truancy or habitual school offender application. Only parents and police officers may file a sexually exploited child application. Counsel should be mindful that although Juvenile Court Standing Order 3-21 suggests that a non-custodial parent may file a CRA, that interpretation is inconsistent with G.L. c. 119, § 39E and should argue to dismiss the case if the petitioner is a non-custodial parent. Counsel should review the affidavit disclosing prior care or custody proceedings, but should also remember that in practice those may not be accurate, so it may be necessary to check Probate and Family Court records.

Counsel should determine whether the clerk, before accepting an application for filing, has, as required by G.L. c. 119, § 39E, (a) informed the applicant that they may delay the filing of the application for assistance pending a referral of the child and family for community-based services; (b) provided the petitioner with educational material regarding available services; and (c) provided petitioners who are parents, guardians or custodians with informational material from the court regarding the CRA process, types of orders the court may issue, and the possibility of changes in custody. If the clerk did not provide the required information and materials to the petitioner, counsel should, consistent with the client's position and goals, seek to dismiss the application or delay the acceptance of the application until such time as the clerk has provided the information and materials to the petitioner. Counsel should also be aware of whether there is a truancy prevention program in the area and if so, whether a school petitioner referred the child to such a program before seeking to file the case.

## **2.2. Child's Right to a Preliminary Hearing**

Counsel shall assert and protect the child client's right to a timely preliminary hearing held within 15 days of the filing of the application. G.L. c. 119 § 39E. Counsel shall also assert and protect the child client's right to be represented by counsel at all hearings, including the preliminary hearing. If the court has held a preliminary hearing without counsel present, counsel shall, consistent with the child client's position and goals, move that the court hold a new preliminary hearing or dismiss the application for assistance. When consistent with the client's interest, counsel should seek to expedite the proceedings.

**Commentary:** Despite G.L. c. 119 § 39F providing the child a right to counsel at the preliminary hearing, local practice varies as to when counsel is, in fact, appointed. In many instances, counsel is not notified of their assignment in advance of the hearing, which may prevent counsel from adequately preparing for the hearing. If this occurs, counsel should advise the client of the need for additional time to prepare and the pros and cons of seeking a continuance. Counsel may also need to request a continuance or reserve the client's right to a preliminary hearing if the client (or the parent) is not present. Counsel should also consider, in consultation with the client, seeking to continue the preliminary

hearing in cases where there may not be probable cause, but the appointment of counsel may assist the client in resolving an issue that led to the filing of the case. For example, it may be in a client's interest to seek a continuance of the preliminary hearing in school-based cases where the client is either not receiving, or is receiving inappropriate, special educational services, and where counsel and the client have reason to believe appropriate services would ameliorate the condition that led to the filing. If a client wants the hearing held quickly, then counsel should instead insist on strict adherence to the statute, requiring that the hearing be held within fifteen days of the filing of the petition.

### **2.3. Preparation for Preliminary Hearing**

In preparation for the preliminary hearing, counsel shall:

- a. *Conduct an initial interview with the client.* At the initial meeting, counsel should:
  - i. explain the role of counsel and the nature of the attorney-client relationship and privilege;
  - ii. explain the nature of the proceeding and the rights at stake;
  - iii. provide the client with a copy of or review with the client the application for assistance and any supporting documentation;
  - iv. gather information from the client regarding the facts of the case, the client and their family, and whether there is any current or past involvement in community-based services;
  - v. determine the client's position and/or whether the client wishes to participate in community-based services;
  - vi. develop with the client a theory of the case, (i.e., a cogent statement of a position that justifies the outcome);
  - vii. discuss with the client their right to refuse to give certain testimony under the 5th Amendment of the U.S. Constitution and Article XII of the Massachusetts Declaration of Rights;
  - viii. thoroughly prepare the client for the court appearance;
  - ix. if consistent with the client's interests and goals, identify services that could ameliorate the conditions causing the case to be filed;
  - x. provide the client (and, where appropriate, the client's parent or other caretaker) with counsel's contact information, court date, and any other important information;
  - xi. explain to the client (and, where appropriate, the client's parent or other caretaker) the importance of notifying counsel of any special education or Section 504 meetings, school manifestation determination review hearing, school disciplinary proceedings, or arrests;
  - xii. attend the initial conference with the child client and the probation officer.

**Commentary:** Counsel for a child should meet privately with the client outside the presence of the parent or other legal custodian, siblings, school personnel,

probation officers, or other collaterals. A meeting or conversation conducted in a courthouse hallway is generally not a substitute for a thorough interview conducted in a private setting but may have to suffice. If courthouse communication is all that can be arranged, counsel should schedule another meeting with the client as soon as possible. See generally Standard 1.5.

The scope and focus of the initial interview will vary according to the circumstances. Counsel shall schedule an initial meeting as soon as possible after receiving the appointment. See Standards 1.1(c), 1.2(a), (b), 1.5(a), (c), (d). Counsel should explain that the client directs the representation. Counsel should also explain the client's legal options and the potential consequences of each option. Counsel should explain to the client the meaning, purpose, procedure, and potential outcomes of the preliminary hearing.

Counsel should bring blank "release of information" forms to the initial meeting so that the client or, if appropriate, the child's parent or guardian, can sign them.

Counsel should obtain information from the client about the client's racial, ethnic, and gender identities, as well as the name and pronouns the client uses, to ensure counsel and all others, including the judge, use correct language when speaking to or discussing the client. Counsel should determine the client's primary language, and if it is other than English, counsel should take whatever steps are necessary to communicate with the client and to enable the client to participate meaningfully in court proceedings, by requesting interpreters for both in-court and out-of-court events. Where counsel needs to communicate with parents whose primary language is other than English, counsel should also engage an interpreter.

If counsel ascertains that the client is not a U.S. citizen, counsel should investigate further to determine what their immigration status is, consult with the Immigration Impact Unit, and seek a referral to an immigration attorney as necessary. It may be appropriate for counsel to work with an immigration attorney and seek findings from the Juvenile Court in support of a Special Immigrant Juvenile Status petition.

Counsel should also determine whether the client has a documented or suspected disability which may require accommodations from the court or probation, or as part of the substantive argument in the case; since the purpose of a CRA is to address conduct "aris[ing] from reasons portending delinquent behavior," counsel should be aware when the presence of a disability may make such a finding impossible. Millis Pub. Sch., 478 Mass. at 775. Counsel should also inquire as to the client's physical and mental health, both to make sure any needs are addressed and to make an independent determination regarding the presence of any suspected disabilities.

Counsel should also be mindful of and invite the client to have a conversation about discrimination that the client may have experienced, based on race, ethnicity, gender identity, disability, sexual orientation, other marginalized identities, any trauma that has resulted, and encourage the client to share their

experiences with counsel throughout the representation. Counsel should also consider explicitly acknowledging to their clients that they are the experts of their own lives and counsel's desire to partner with them to support the client's success as the client defines it.

- b. *Conduct Independent and Thorough Investigation.* To the extent possible prior to the preliminary hearing, counsel should conduct an investigation independent of that of probation or any other party to the proceeding. Counsel should review records and interview witnesses, consistent with the client's interests and goals, and with the client's permission.

**Commentary:** For a discussion of counsel's obligations to investigate each case, see Standard 3, infra. Counsel should be mindful that to discuss the case with anyone not already aware of it is to reveal confidential information about the client. Additionally, counsel should be mindful of the client's desire not to share private information such as therapeutic communications with anyone, including counsel. For further information regarding privilege and confidentiality, see Standard 1.8, supra.

- c. *Ensure the Availability of Documentary and Testimonial Evidence.* When appropriate, prior to the preliminary hearing and if consistent with the client's interests and goals, counsel shall identify and interview potential witnesses, prepare such witnesses for the hearings, and subpoena documents and/or witnesses to appear at court for the hearing.

**Commentary:** Counsel may find it wise to obtain and review the documents via a release of information signed by the client and their parent(s) prior to subpoenaing them to court so as to ensure that the documents are helpful to the client's position and consistent with the theory of the case.

- d. *Prepare Witnesses.* Counsel should interview potential non-party witnesses prior to the hearing. To the extent counsel intends to call such witnesses, counsel shall prepare his or her own witnesses for direct and cross examination in advance of any hearing at which counsel intends to call those witnesses and, if needed, have witnesses served with a subpoena prior to the hearing.

#### **2.4. Conduct of Preliminary Hearing**

To the extent consistent with the client's position and goals as determined pursuant to these Performance Standards, counsel shall, at the preliminary hearing:

- a. protect the client's right to be present at the hearing by ensuring that there is a plan for them to get to court;
- b. provide evidence in support of the client's position;
- c. make legal arguments supported by statute, case law, and the Standing Order where applicable; and

- d. take all other necessary and appropriate actions to advocate for the client's position and goals.

**Commentary:** If counsel believes that the client has a strong chance of contesting the allegations and the client wants the case to be dismissed, then counsel should gather any evidence necessary to mount a strong defense. If there is an adverse ruling after a hearing, counsel should discuss the possibility of an appeal, pursuant to Standard 9.1, *infra*. Regardless of which position the client wishes to take, counsel must be mindful of their obligation to counsel the client. There may be cases in which a quick dismissal would not be most beneficial to the client's longer-term interests, and counsel must explain such a possibility to the client, although counsel must advocate for the client in accordance with Standard 1.6, *supra*. Where, for example, seeking an outside evaluation, hiring a defense team social worker or engaging the office social worker, or the obtaining the services of an education advocate could resolve issues, it may be worth suggesting to the client keeping the case open, but counsel must always defer to the client's wishes regardless of their own opinion.

## **2.5. Dismissal of Application for Assistance**

If the case is dismissed in the informal stage, counsel shall ensure that the court issues an order of expungement of all court and probation records relating to the proceeding. Counsel may also explore whether the record could be expunged at any stage thereafter utilizing the broad language in G.L. c. 119, § 39E which states, "when an application for assistance is dismissed under this section, the court shall enter an order directing expungement of any records of the request and related proceedings."

The CRA statute requires that CRA records be expunged following dismissal of a petition. Some courts and counties do not have procedures for ensuring that CRA records are expunged. Counsel should advocate that the records be expunged, and if a later CRA is filed regarding the child, counsel should object and move to strike any information shared by anyone regarding the dismissed and expunged CRA case, since retaining an institutional memory of the case in any form is inconsistent with the plain language of the statute.

## **2.6. Obligations of Counsel when Child is Placed in Temporary DCF Custody Prior to Adjudication**

- a. Consistent with the client's position and goals, counsel shall object to a grant of temporary custody to DCF prior to adjudication. Counsel should consider exploring other possible custodians if the judge is considering a change of custody and requesting a third-party custody hearing if the child desires it.

**Commentary:** Counsel should be prepared to argue that a court may grant temporary custody to DCF only in stubborn child cases. The language of the statute is ambiguous, and counsel should argue that the ambiguity is caused by a

drafting error. The Juvenile Court’s Standing Order 3-21 suggests resolving the ambiguity in favor of a broad reading of the statute; counsel should argue that this reading is incorrect, inconsistent with the narrow reading of the prior CHINS law in *In re Angela*, 445 Mass. 55 (2005), and that the court can only grant temporary custody to DCF in stubborn child cases where the court has found that the child is not likely to appear. Counsel should argue that prior to making that finding, there must be some evidence that the child has been informed of the court date and has failed to appear or failed to respond to a lawfully-issued summons.

- b. Where the court has granted DCF temporary custody prior to adjudication, consistent with the client’s positions and goals, counsel shall:
  - i. ensure that the initial grant of temporary custody does not exceed fifteen (15) days;
  - ii. ensure that a temporary custody review hearing is held before the expiration of the initial grant of temporary custody, and that the duration of the entire temporary custody order does not exceed a total of forty-five (45) days;
  - iii. ensure the child is given the opportunity to attend each temporary custody review hearing;
  - iv. at each temporary custody review hearing, take any and all other necessary and appropriate actions to advocate for the client’s position and goals, including whether DCF is making reasonable efforts for the child to return home timely.

**Commentary:** If consistent with the client’s position and goals, counsel should argue that the temporary custody provision of G.L. c. 119, § 39H should be used only in stubborn child applications where the child is likely not to appear at a future hearing.

Before granting temporary custody to DCF, the court must determine either that DCF has made reasonable efforts to prevent the child’s removal from their home or that “there is an immediate risk of harm or neglect” that prohibited DCF from providing such services as an alternative to removal. G.L. c. 119, § 39H. Where the client objects to a temporary custody order, counsel should challenge these findings.

- c. Trial counsel shall, where appropriate, appeal a temporary custody order by filing a petition to a single justice of the Appeals Court under G.L. c. 231, § 118. Counsel shall provide the CAFL administrative office with a copy of the petition and any supporting memoranda. See Standard 9.1, infra., regarding appeals.

**Commentary:** Private counsel considering an appeal should immediately contact the CAFL Appellate Panel Support Unit for assistance; staff attorneys should contact the CAFL Appellate Unit. See Standard 9.1 and commentary, infra., regarding appointment of appellate counsel.

## 2.7. Role of Counsel During Informal Assistance

- a. *Negotiate the CRA Agreement.* Counsel shall meet with the parties and the probation officer to negotiate the specific terms of the CRA agreement. Counsel should negotiate with the probation officer to ensure that the conditions contained in the agreement are specific to the child's individual needs, reasonable under the circumstances, and realistic for the child to achieve.

**Commentary:** Counsel should discuss the proposed conditions with the probation officer in advance, then discuss the proposed conditions with their child client to determine the conditions the client is both willing and able to abide by. If unable to persuade the probation officer that the proposed conditions are unreasonable, unattainable, or excessive, counsel should raise those concerns with the court. Counsel should be sure that the conditions imposed are specific to the child's needs and not merely standardized conditions that do not consider the facts of the particular case. For example, for a child who is struggling with depression, including a condition requiring them to attend school daily may not be realistic and may be setting the child up to fail. Counsel should also be mindful that some conditions ("comply with DCF services" or "cooperate with DCF") may impermissibly delegate to the executive branch the power to determine conditions and terms of informal assistance. See Article 30 of the Massachusetts Declaration of Rights (separation of powers between the independent branches of State government); Commonwealth v. Quigley Q., 99 Mass. App. Ct. 1112, 19-P-1548 (Feb. 24, 2021).

- b. *Advocate for Provision of Services.* Consistent with the client's wishes, counsel shall advocate for the provision of services to the child and/or their family. Where a child presents complex needs, counsel shall consider hiring a social worker or other expert, or engaging the office social worker, to evaluate the child and recommend appropriate services.
- c. *Advise Client of Possible Consequences.* Counsel shall advise their client about the possible consequences of their failure to abide by the conditions set forth in the CRA agreement.

**Commentary:** Many children and parents involved in CRA cases are unfamiliar with DCF and may not understand the potential consequences of failing to comply with the agreed upon conditions or recommended services. Counsel should inform their clients that a child's continued refusal to attend school, follow a parent's rules, or participate in services may result in the child being placed in DCF custody and removed from their home.

- d. *Conduct of Informal Reviews.* Counsel shall ensure that informal assistance does not extend past six (6) months and that a review hearing is conducted every 90 days. Counsel must ensure that their client has an opportunity to be present for each informal assistance review. At each

- e. informal assistance review hearing, counsel shall take any necessary and appropriate actions to advocate in furtherance of the client's position and goals.

**Commentary:** Counsel should be aware and advise the child client that, pursuant to G.L. c. 119, § 39E, during the informal assistance period, neither the child nor the child's parents may be compelled to appear at any conferences, produce any papers, or visit any place, but that their refusal may be reported by probation to the judge. Additionally, counsel should guard against any statements made by a child or by any other person during the period of informal assistance being used against the child at the fact-finding hearing to determine that the child requires assistance (except for the purpose of disposition).

### 3. INVESTIGATION, DISCOVERY, EXPERTS

To develop and support the client's position and goals, counsel should conduct an independent, thorough, and continuing investigation at every stage of the case.

**Commentary:** Thorough, thoughtful, and independent investigation is necessary for counsel to develop a theory of the case consistent with the client's position. Counsel should identify potential evidence, whether beneficial or detrimental to the client's position. See also Standard 2.2(b), supra.

#### 3.1. Informal Discovery

- a. *Meet with Client.* Counsel shall meet with the client and obtain from the client information relevant to the proceeding and the client's position.

**Commentary:** The client is an important and primary source of information regarding the facts of the case, the family, and their history. The client may also assist counsel by identifying sources of information and records which may be relevant to the proceeding. Even with younger children, counsel can obtain valuable information from meeting with the child and viewing the child in several environments, such as at home or in school. See Standard 1.5, supra. Counsel should maintain an adequate, contemporaneous record of such client interviews.

- b. *DCF Records.* Where the family has been involved with DCF, these records may be an integral part of the preparation of a case. If so, counsel should obtain the DCF file. DCF records may be obtained through formal or informal discovery.

**Commentary:** Where DCF is a party to the CRA proceeding, counsel can obtain the family's DCF record by submitting a written request to the appropriate DCF office. Where DCF is not a party, to obtain these records counsel will need a release signed by a parent or a court order for DCF to produce the file.

It is also not uncommon for children with CRA cases to have been adopted from

DCF custody. It may be worth inquiring into the child client's birth history and seeking DCF records from prior to the adoption. Counsel may need to file a motion to obtain records from prior to the adoption.

A review of the most current DCF policies and regulations on its website provides guidance as to the potential documents which will be generated or obtained by DCF when servicing a family. The records received from DCF may not contain the home finder records or any other records on the foster or pre-adoptive home. Counsel may need to file a motion to obtain those records.

- c. *Court Records.* Counsel should obtain and review all records filed with the court including but not limited to any court clinic, probation, and guardian *ad litem* reports.
- d. *School Records.* Where relevant and in all school-filed petitions, counsel shall obtain and review the child's student records including but not limited to any attendance, academic, psychological, medical, special education, or disciplinary records.
- e. *Other Records.* Counsel shall obtain and review relevant medical, psychiatric, psychological, social service, substance use disorder, law enforcement, CORI records, as well as records of other court proceedings, as appropriate. Counsel should ascertain whether the client is a U.S. citizen and, if not, investigate the client's immigration status.

**Commentary:** Counsel should be aware that the issue of who may consent to the release of confidential information about a child is a complicated one. If the child is not in DCF custody, generally the custodial parent has the authority to grant or withhold consent. The parent can sign releases for an attorney to access confidential information about the child. Where the parent is unrepresented, child's counsel may contact the parent directly to request they sign such a release. When the child is in DCF custody, with some exceptions, DCF can authorize the release of the child's confidential information to their attorney. The best practice, however, is for child's counsel to ask the child to sign a release as well.

If a parent or DCF refuses to sign a release for child's counsel, or where probation, DCF, the petitioner, or others refuse to provide documents promptly, counsel should consider filing a motion for the court to order release of the necessary information. Where counsel is seeking information that other parties may not be privy to, or where counsel does not wish to reveal their trial strategy, counsel should file such motions for release of records *ex parte*, seek to impound the motion, and assert their client's right to the information and to the effective assistance of counsel.

Where a parent whose position is adverse to that of a child client tries to assert

or waive the child client's privilege or right to confidentiality against their wishes, counsel should advocate for the child client's ability to determine whether their privilege or right to confidentiality is exercised or waived.

Counsel should be mindful when researching a client's immigration status that both child client and adults who do not have legal immigration status may be very reluctant to share that information, having lived in fear of deportation, so it may be appropriate to wait until a solid attorney-client relationship has been established to investigate this issue. If counsel learns that a client does not have legal immigration status, consult with the Immigration Impact Unit, and seek a referral to an immigration attorney as necessary; it may be appropriate for counsel to work with an immigration attorney and seek findings from the Juvenile Court in support of a Special Immigrant Juvenile Status petition. See Commentary to Standard 2.3, supra.

- f. *Interviews.* Counsel should contact and interview, where appropriate, those individuals with information concerning the family, such as parents, relatives, caretakers, neighbors, DCF case workers and other social service personnel, school personnel, medical providers, treatment providers, former counsel, probation officers, as well as those individuals who are suggested by the client or identified through investigation or discovery as potential witnesses.

**Commentary:** Counsel should be mindful of Rule 4.2 of the Massachusetts Rules of Professional Conduct, which prohibits an attorney from communicating about the subject of the representation with a person known to be represented by counsel in the matter unless the other attorney consents. Counsel should also remember that because these proceedings are impounded, discussing the case with anyone not already aware of it implicates the client's confidentiality rights and should discuss such interviews with the client before conducting them. See also commentary to Standard 2.1(a), supra. In speaking with collaterals, counsel may wish to state only that they are working with the family without revealing any additional information.

- g. Counsel should, when appropriate, contact opposing counsel, if any; the petitioner if unrepresented; and the probation officer to gather information about the case and the positions of the other parties.
- h. Counsel should, if appropriate, attend all service planning, treatment, and placement meetings, administrative reviews and hearings and other proceedings involving the client. In addition, if counsel represents a child, counsel should, if relevant to the case, attend school conferences including but not limited to Individualized Education Plan (IEP) or 504 meetings, disciplinary hearings, manifestation determination review hearings and advocate for the child's position.

### **3.2. Formal Discovery**

Formal discovery is rarely necessary in CRA cases. When it is appropriate, however, counsel should consider the following types of formal discovery: depositions, interrogatories (including expert interrogatories), requests for production of documents, requests for admissions, and motions for mental or physical examination of a party.

**Commentary:** Counsel should timely file and seek court action on any motions to permit, compel, assist or oppose discovery as is required by the applicable court rules or the Indigent Court Costs Act. In addition, counsel may deem it appropriate to seek sanctions for a party's failure to comply with discovery requests or orders.

### 3.3. Experts

- a. *Determine Whether an Expert is Needed.* Counsel shall determine in a timely manner whether retaining an expert is necessary in preparing or presenting the case.

**Commentary:** Counsel may hire a testimonial expert to provide testimony in a hearing or trial, or a preparatory expert to assist counsel in preparing the case, or both. The need for expert assistance should be considered throughout the case. More than one expert may be needed in a particular case.

It is likely that hiring a social worker, for private counsel, or engaging the office social worker, for staff attorneys, will be beneficial. Counsel should consider doing so to assist in locating appropriate services to address the issues that brought the case in.

- b. *Obtain the Necessary Funds.* If counsel determines that retaining an expert is necessary, counsel shall file a motion under the Indigent Court Costs Act to obtain the necessary funds to retain an expert. If the motion is denied in whole or in part, counsel shall consider filing a notice of appeal in superior court in accordance with G.L. c. 261, § 27D.
- c. *Confidentiality.* Counsel shall protect the confidentiality and work product privilege of all expert-related information by filing motions for costs on an *ex parte* basis, requesting impoundment of such motion, and informing the expert about the attorney-client privilege, attorney work-product protections, and outlining a clear scope of work by sending the expert a letter of engagement.

**Commentary:** Otherwise discoverable documents enjoy a qualified immunity from discovery if they are attorney work product pursuant to Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure. Work by an expert retained by counsel is similarly protected. Counsel should send the expert an engagement letter that explains the expert's role in assisting counsel and directs the expert not to speak to anyone about their work without counsel's express permission. Counsel should instruct the expert not to write a report unless specifically

requested to do so in writing. If counsel makes a strategic decision to share the results of the expert's work, counsel shall inform the expert and convey such results directly. Counsel should not allow another attorney to speak directly to the expert outside counsel's presence. If counsel fails to take adequate precautions, they may inadvertently waive the work product protection. See Adoption of Sherry, 435 Mass. 331 (2001).

- d. *Testimonial Experts.* Counsel shall be familiar with the foundational requirements for the admission of expert testimony and shall adequately prepare an expert to testify. Counsel must also prepare to cross-examine other parties' experts.

**Commentary:** For testimonial experts, adequate preparation is essential. Adequate preparation is also essential if counsel is opposing admission of expert testimony. Counsel should be aware that some fact witnesses not previously qualified as experts may attempt to offer inappropriate opinions (e.g. DCF case workers, social workers, *guardians ad litem*, and treatment providers). Where the opinion is not aligned with the client's goals, counsel should move to strike those unqualified opinions and be prepared to challenge a witness's qualifications to provide opinion evidence as an expert.

## 4. ADVOCATING FOR SERVICES

### 4.1. Educational Advocacy

Counsel should be sufficiently familiar with education law, disabilities, and developmental stages to enable them to recognize when child clients have unmet educational needs. Counsel should be prepared to address those unmet needs or poorly-matched services competently or seek assistance from their AIC, the Trial Panel Support Unit and/or the EdLaw Project, consistent with the client's goals and wishes.

**Commentary:** Frequently when children misbehave in school, struggle, or fail to attend, those behaviors stem from unmet educational needs or a poor match between services offered and the child's needs. Counsel should review the child client's school history, be aware of what issues the school has identified, what, if anything, the school has done to ameliorate the situation, and what else the school could or should be doing, consistent with the client's wishes. Even where children have an IEP or a 504 plan, the school may not be implementing the plan properly, have relied on outdated or misinterpreted data, be providing minimal services or support, or the plan may not be written in a way that actually meets the child's needs. When children who receive special educational services face school discipline, additional protections apply, and counsel should be prepared to assist the child client in such situations. It may be necessary for counsel to hire an expert to address some or all of these issues. See Section 3.3, supra. It may also be necessary to coordinate with parents or their counsel, if any.

Child clients may face school-based CRAs for other unmet needs as well: a teen parent may need childcare to attend school; a child may not be attending or

behaving because of medical, behavioral health, or other issues within the family; or the child could be bullied in school or on the way to or from school. Counsel should be mindful of exposing the family to DCF intervention where, for example, a parent's health issues are causing the client to miss school to care for younger siblings. Counsel should seek direction from their client before exposing the family to additional collateral consequences, and should consider hiring a defense social worker or engaging the office social worker to assist in referring the family to useful supports, consistent with the client's position. Counsel should also be mindful of a child client's educational stability if the client is placed outside the home and should advocate to protect it, consistent with the client's goals and wishes. Counsel may contact the EdLaw Project for additional advice as needed.

Counsel should also be prepared to discuss issues of racial and other types of discrimination with their client, and to address these issues with their client's permission. It is well-documented that children of color face disproportionate school discipline. LGBTQ youth have also faced discrimination, harassment, and unfair disciplinary practices at school. It has also been documented that girls, all children with school-based petitions, and older youth are more likely to have unmet needs at the onset of a CRA case. Where consistent with the client's goals and wishes, counsel should argue that the child client's behavior does not rise to the level of a CRA, and that the school is treating the behavior as problematic (rather than the school providing additional supportive services) because of the client's race, ethnicity, gender identity, sexual orientation, disability, or other marginalizing factor. Similarly, what the school describes as problematic behavior could be a manifestation of the client's disability for which the school must provide reasonable accommodations, rather than file and prosecute a CRA.

#### **4.2. Behavioral Health Services**

Counsel should be sufficiently familiar with behavioral health services available in their area to enable them to advocate for the provision of such services, or counsel must consider hiring a social worker or engaging the office social worker. When appropriate, counsel should advise the client that accepting services may be the only way to achieve a larger goal, such as remaining at home.

*Commentary:* Counsel must be mindful of their role as counselor as well as advocate; blindly advocating for the client's position without the client having to make any concessions or behavioral changes is unlikely to lead to the client's desired outcome, especially in the longer term. Counsel should consult with the client about how they believe they can be most successful and assist the client in creating a proposal to mitigate whatever issue brought the case in. Counsel should be prepared to argue, if consistent with the client's wishes, about how the supports the family needs and the supports that have been provided through the CRA process do not match, and why other supports might be more appropriate.

If a child client is seeking gender affirming care, counsel should be prepared to help advocate that they receive it. Additionally, when assisting the client in obtaining behavioral health services, counsel should seek counselors who are

supportive of the client's gender identity and sexual orientation.

For child clients in need of substance use treatment, and willing to receive it, G.L. c. 111E, § 13A provides a procedure for DCF or the Juvenile Court to refer a child to the DPH services for substance use treatment. Counsel should also warn clients of the potential for others to utilize the court to seek the child's involuntary commitment for substance use disorder under G.L. c. 123, § 35.

The CRA statute encourages the use of services paid for by private insurance. In practice, however, many CRA clients will have MassHealth. They will therefore likely be eligible for services under the Children's Behavioral Health Initiative ("CBHI") and the mental health supplement to CBHI. Additionally, there is a statewide network of community-based programs to provide mental health and substance use treatment referrals and services to children and adults. Services located within the client's community may be more attuned to the client's contextual experience, including predominant linguistic, cultural, and family traditions, as well as values.

Counsel should be aware that children over the age of 16 may consent to their own inpatient mental health treatment. Children may also be the subjects of involuntary commitment proceedings, either for psychiatric reasons or for substance use disorder. If such a petition is filed, counsel should seek appointment of counsel for the client who is certified to handle such proceedings. Counsel may contact their AIC or the Trial Panel Support Unit for assistance as attorneys must be separately certified to accept such cases. The CRA attorney, however, should coordinate with the assigned attorney in these other matters to ensure the client experiences continuity in representation and so important information can be shared, consistent with the client's wishes.

#### **4.3. Other state agencies**

Counsel should be sufficiently familiar with the services available from other state agencies, including but not limited to DMH and DDS, to allow them to advocate for their client to receive such services in accordance with the client's goals and wishes.

**Commentary:** Often multi-agency eligibility results in disputes between the agencies as to who will be responsible for service provision. Counsel should be prepared to navigate such disputes or should contact the Trial Panel Support Unit or their AIC for assistance.

This issue is of particular concern for families who are already involved with DCF, and counsel should be prepared to navigate such disputes. Counsel should also be aware that a "Unified Planning Team" (UPT) may convene a meeting for children who are involved with three or more state agencies as defined in 110 C.M.R. § 17.03. Counsel can request a UPT be convened or ask the court to request one.

Counsel should also be aware of resources available through federal

agencies. For example, in a case where a school is denying a child client procedural due process, counsel might file a complaint with the federal Department of Education's Office for Civil Rights.

## 5. FACT-FINDING HEARING

Counsel must be present for the fact-finding hearing and prepare the client in advance. Counsel must inform the client that they are entitled to a trial, and if the client wishes to contest the CRA, counsel must prepare for trial and object to any efforts to circumvent appropriate procedure. Counsel must secure the presence of any necessary documents and witnesses and prepare any witnesses counsel intends to call to testify. See Standard 2.2, supra. Counsel should consider requesting that a different judge preside over the fact-finding hearing from the one who presided over the earlier stages of the case if it is in the client's interest to do so. See Standard 9.1 regarding appeals.

*Commentary:* While it may be common for child clients to stipulate to a finding that they require assistance, counsel must discuss the risks and benefits with the child client. If the client is going to admit to being a child requiring assistance, best practice for the court is to conduct a colloquy; if the court does not, counsel should request one where appropriate. In very rare circumstances, where a child client is unable to make adequately considered decisions, counsel may wish to raise the issue of competency to stand trial and may seek to litigate the issue in the appropriate case.

Where it will advance the client's position, counsel should seek a continuance of the fact-finding hearing, such as where there are outstanding services that could ameliorate the situation. Particularly where there is a risk of the child entering DCF custody at the dispositional phase of the case, it may be in the child's interest to delay the hearing for as long as possible. Counsel should also inform petitioner-parents who are not represented by counsel that once the court has adjudicated the child as requiring assistance, the court does not have to dismiss the case upon the parent's request.

Often courts will attempt to treat CRA cases as less than formal proceedings. Counsel should resist any efforts by the court or probation to pressure the parties into handling the case in any way that does not strictly comply with the statute, such as relaxing the rules of evidence, if it is not in the client's interest. See G.L. c. 119, § 21A. Counsel should guard against information obtained during the informal assistance phase being used in the fact-finding hearing, since the statute expressly forbids this practice. Where the petitioner is proceeding pro se, counsel should object to the judge or probation assisting the petitioner in prosecuting the case. Counsel could argue that it is inappropriate for a probation officer to act as an attorney in prosecuting the case and that the petitioner must present the case, that the rules of evidence must be strictly adhered to, or that if the petitioner fails to appear, the case should be dismissed immediately.

Even if the CRA is dismissed after the child has been adjudicated in need of assistance, counsel should file a motion to expunge and argue that the language

in § 39E applies to both pre- and post-adjudication dismissals.

## **6. CONFERENCE AND DISPOSITION**

### **6.1. Conference**

Counsel shall be present for the conference and shall have met with the client sufficiently beforehand to prepare. Counsel shall secure the appearance of any person who may be helpful to the client's position and shall object to the appearance of any person who will be hurtful to the client's position if that person is not a party to the case or on the list of potential participants found in G.L. c. 119, § 39G. Counsel shall object to the discussion of confidential or privileged information unless the privilege has been waived, or unless the client consents to the disclosure and it is in the client's interest for the information to be shared. The conference may be waived, but counsel shall discuss that decision with the client in advance.

*Commentary:* If there is privileged information whose disclosure would benefit a child client and which the client would consent to release, counsel should seek the appointment of a guardian ad litem to waive the privilege. If there is privileged information which the client does not want released, counsel should seek a protective order to prevent the information from being discussed. Counsel should be mindful that information discussed at the conference may be admissible at the disposition hearing.

The probation officer assigned to the case is required to submit a written report to the court. In practice, probation officers do not always submit such reports. If it is local practice that they be submitted, counsel should insist on having sufficient time between receipt of the report and the hearing to address the report. Counsel should also consider drafting a competing report with ample citation to caselaw, and if appropriate, an affidavit from a hired expert or collaterals.

Juvenile Court Standing Order 3-21 suggests that probation may conduct conferences without the family present. There is no such authority in the statute, and counsel should argue that if probation attempts to do so, they are in conflict with their obligation, and that of any providers for the family, to maintain confidentiality.

### **6.2. Disposition**

Counsel shall be present for the disposition hearing and have met with the client sufficiently beforehand to prepare if the disposition will not be held at the same time as the conference. Counsel shall explain the dispositional alternatives to the client in advance of the hearing. If the child intends to stipulate, counsel shall ensure that the client fully understands the terms of the agreement in accordance with Standard 1.6 supra and is willing and able to comply with the agreed-upon conditions. Counsel shall ensure that the child understands the case can be advanced by probation or another party if the child is not meeting the conditions

of the agreement.

**Commentary:** If the client intends to stipulate, counsel must make sure to negotiate conditions with probation which the client is capable of meeting and that are specific to the individual child's needs. Counsel should not agree to a condition in a truancy case, for example, that a child will attend school every day if the child has been out of school for a long period but should instead seek to negotiate a condition such as the child agreeing to make best efforts to attend school or to attend school 70 or 80 percent of the time, unless the absence is excused. Counsel should also ensure that the child client understands the terms of the agreement. If the court does not accept the agreed-upon terms, counsel should be prepared to seek permission to withdraw the client's stipulation.

Counsel should also seek to ensure that there is an appropriate plan for the child upon disposition. This should include exploring other possible custodians if the judge is considering a change of custody, and requesting a third-party custody hearing if the child desires it.

## **7. REPRESENTING CLIENTS INVOLVED WITH DCF**

### **7.1. Services and Placement Issues**

Counsel should be familiar with DCF's obligations to provide services, and appropriate placements in cases where the child is or may be placed out of the home, under 110 C.M.R. 7. Counsel should also be familiar with DCF's policies. Consistent with the client's interests and goals, counsel shall request that DCF make reasonable efforts and provide appropriate services in a timely manner to the client and/or members of their family. Counsel should be prepared to litigate issues of DCF services, reasonable efforts, and/or placement where consistent with the client's interests and goals. Counsel should also, consistent with the client's interests and goals, investigate the availability of services or benefits provided by other public or private agencies or organizations and seek such services for the client, as well as continuously explore the availability of kin to provide placement either as a foster parent or through third-party custody, where appropriate.

**Commentary:** Counsel should be aware that if a child client is committed to DCF, all procedural remedies available in care and protection cases are also available to the client, including grievances, fair hearings, and motion practice. Counsel should also be aware that the Indian Child Welfare Act applies in CRA cases where a child enters DCF custody. Counsel may wish to review the Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases for further guidance.

In cases with complex service needs, counsel should consider hiring a social worker, either as a defense team social worker or as a testimonial expert, or another expert to evaluate the child and recommend appropriate services, or for staff attorneys, engaging the office social worker. Counsel should be aware that DCF is statutorily obligated under G.L. c. 119, § 39K to provide specific services

to children who have been sexually exploited and should be prepared to advocate for the provision of those services.

There is a shortage of placements for teenagers in DCF custody, so emergency residential group home placements (regardless of client needs or the ability of the program to meet the client's needs) are the most likely initial placements. Counsel should be sufficiently educated about local and statewide resources to counsel clients who do say they want to leave home about what the likely outcome will be. If the client is clear that they do not want to remain at home, counsel and their social worker should conduct an independent investigation into what placement options are available, including kin. Counsel should be aware that if a child client does not wish to be placed at home and has been abused or neglected at home, then DCF must give "due consideration" to the child's wishes. G.L. c. 119, § 39G.

Counsel should also be aware that children in substitute care are much more likely to come into contact with the delinquency system, which counsel may wish to discuss with their client. In addition to the required visits discussed above, it is imperative to visit children in substitute care, including congregate care, regularly to ensure that their needs are being met and that their providers are complying with the law and utilizing best practices, as well as supporting the child client's racial, ethnic, religious, cultural, and gender identities. If a placement is not supportive of a client, counsel may wish to discuss with the client seeking a placement that will be, because it is well-documented that children in substitute care, and especially in congregate care, have been misgendered, harassed, bullied, and abused. With their client's permission, counsel should consider reporting their concerns with substitute care providers such as limited attorney visitation or contact, inadequate access to food, overcrowding, or other issues to the DCF worker, DCF Ombudsman, Office of the Child Advocate, and/or the program's licensor.

It may also be in the client's interest to negotiate with DCF about filing a care and responsibility petition in the Probate and Family Court under G.L. c. 119, § 23(a)(1). For parent clients especially, this may be an advantageous outcome because the parent can retain more control and it can be effective where there are doubts about the child's competency to stand trial or the willfulness of the child's conduct.

Counsel may advocate that services be provided to the client, to another family member, or to the child's substitute caretaker. For example, where the child supports reunification, child's counsel may advocate that the parent receive particular services necessary to enable the parent to care properly for the child. Alternatively, parents' counsel may advocate for the child to receive particular services necessary to permit the child to return home.

## **7.2. Administrative Proceedings**

Counsel should represent the client at all appropriate administrative reviews, including but not limited to foster care reviews and fair hearings. Counsel should

request fair hearings or file grievances where consistent with the client's wishes and goals. Counsel should also advocate for appropriate case planning for all clients involved with DCF and challenge DCF's plan through available administrative and judicial means.

**Commentary:** Counsel may wish to review the Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases for further guidance.

### 7.3. Permanency Hearings

If the child remains in DCF custody long enough to trigger the statutory requirement for a permanency hearing, counsel shall assert and protect the client's right to a hearing on the permanency plan for the child and file written objections to the goal and reasonable efforts findings in the 29B plan where appropriate and consistent with the child's position.

**Commentary:** Pursuant to G.L. c. 119, § 29B, the court is required to hold permanency hearings for all children in DCF custody, including pursuant to a CRA. The court must make a finding as to whether or not DCF has made reasonable efforts to reunify the family if the child is out of the home. Counsel should ensure that the court holds a hearing on the permanency plan in all CRA cases and should request an evidentiary hearing where appropriate. Counsel should consider asking for more frequent permanency hearings, consistent with the client's interests and goals, according to the ruling in Care and Protection of Rashida, 488 Mass. 217 (2021).

In the event that the court denies or improperly limits the client's right to a permanency hearing, counsel should consider pursuit of any available avenues for relief, including but not limited to interlocutory appeal. See Standard 9.1, infra. Counsel should ensure that the appellate record is preserved by making detailed and specific offers of proof through, among other methods, affidavits or oral or written proffers.

- a. *Preparation for hearing.* In preparation for the permanency hearing, consistent with the client's interests and goals, counsel shall:
  - i. obtain and review the permanency plan for the child filed by DCF, ensure DCF has complied with the time standards included in Trial Court Rule VI, and determine the extent to which the plan is consistent with the client's position;
  - ii. if the proposed plan is inconsistent with the client's position, file a timely written objection, including where DCF has failed to provide the requisite notice for counsel to respond, seeking additional time to respond in writing;
  - iii. conduct any necessary discovery;
  - iv. determine what documentary and testimonial evidence to present;
  - v. prepare for the direct and cross examinations of witnesses; and

- vi.
- vii. take all necessary and appropriate steps to ensure the availability and presentation of evidence at the hearing, including but not limited to the issuance of subpoenas and the filing of motions.

**Commentary:** Counsel should be familiar with Trial Court Rule VI, Uniform Rules for Permanency Hearings. Counsel should seek a continuance of the permanency hearing when the petitioner has not complied with Trial Court Rule VI, unless a continuance is inconsistent with the client's position. Counsel should note that there are additional pleading requirements incumbent on DCF in 29Bs for children in DCF's care or custody who are 14 years old and older, as well as those who are 17 years and 9 months or older, and for young adults.

- b. *Conduct of Hearing.* During the hearing, counsel shall act as a zealous advocate. To the extent consistent with the client's interests and goals, counsel shall:
  - i. file all appropriate written objections, motions, witness and exhibit lists, and/or legal memoranda;
  - iii. present and cross examine witnesses and submit documents;
  - iv. make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal;
  - v. consistent with the client's goals, advocate for a finding as to reasonable efforts; and
  - vi. prepare requested findings of fact, conclusions of law, and proposed orders, consistent with local practice.

**Commentary:** Where appropriate, counsel should seek to secure specific orders at the permanency hearing, as a means for expediting permanency for the child. For guidance regarding the client's participation at the permanency hearing, see Standards 1.5, 1.6 and 2.3 and commentary thereto, concerning the presence of the client and the client's direction to counsel.

Counsel should be aware of what the court does and does not have authority to order, and argue against any illegal order issuing, as well as be prepared to explain why the child cannot be held in contempt.

- c. *Appeals:* If the client wishes to appeal the permanency hearing decision, counsel shall file a timely notice of appeal and follow the rules set forth in Section 9.1.
- d. *Children 14 or older.* Counsel should ensure that DCF is complying with its obligations under G.L. c. 119, § 29B(c) once a client attains the age of 14, and under 110 C.M.R. 23 as the client approaches 18.

## **8. DISPOSITIONAL EXTENSION HEARINGS**

Counsel shall be present for all extension hearings. Prior to the hearing, counsel shall meet with

the client to determine whether the client will agree to the disposition continuing for another 90 days. Counsel must explain the standard for extending the disposition and if the client wishes to challenge the extension, counsel shall gather evidence to demonstrate that the purpose of the order has been accomplished.

**Commentary:** The SJC has said that many of these hearings can proceed “on the papers,” although where there is an out-of-home placement or commitment to DCF, the child is entitled to an evidentiary hearing. Even where there is no out-of-home placement or commitment to DCF, however, counsel should consider requesting an evidentiary hearing if the client is opposed to an extension. Counsel should also be aware of how many extensions have already been granted and object to any beyond the statutorily permitted number, or any that would extend the case beyond the statutory age of the child for which each type of case may continue, or beyond the 390 days any CRA case can be held open. Nonetheless, counsel should advise the client that even if the case is ripe for dismissal based on the age of the case or the child, a new CRA could be filed, which would re-set the clock. For clients who do support dismissal, counsel should be prepared to argue that the objectives of the CRA have been met.

## **9. APPELLATE AND POST-JUDGMENT REPRESENTATION**

### **9.1. Appeals**

All appeals from CRA decisions are interlocutory in nature. G.L. c. 119, § 39I.

- a. *Interlocutory appeals.* Counsel shall discuss with the client their appellate options regarding any adverse decision from the court. If the client elects to appeal, counsel shall file a timely appeal and order recordings or transcripts or ensure that they have been ordered. If appropriate, counsel shall also request a stay of the judgment pending appeal. Counsel for the appellee shall monitor appellant’s compliance with appellate deadlines. Counsel filing interlocutory petitions shall provide the CAFL Appellate Panel Support Unit with a copy of the petition and any supporting memoranda. Counsel must be mindful that there is a strict 30-day statutory filing deadline for interlocutory appeals and no extensions are permitted under the statute.

**Commentary:** Private counsel considering an appeal should immediately contact the CAFL Appellate Panel Support Unit for assistance or to request the assignment of appellate counsel; staff attorneys should contact the CAFL Appellate Unit. Time is of the essence because there is a statutory 30-day filing deadline for interlocutory appeals that cannot be extended. Trial counsel remains responsible for representation at the trial court. Trial counsel is expected to be responsible for a single justice appeal unless trial counsel seeks appointment of appellate counsel. Resource attorneys, the CAFL Trial Panel Support Unit, and for staff attorneys the CAFL Appellate Unit, are available to provide advice on such matters on a case-by-case basis. The CAFL Appellate Panel Support Unit

can assign a mentor to assist counsel with the filing of the petition. The appointment of appellate counsel on behalf of a client does not terminate trial counsel's ongoing responsibilities to the client in proceedings before the trial court.

Analogous case law (see Commonwealth v. Moffett, 383 Mass. 201 (1981) and Care and Protection of Valerie, 403 Mass. 317 (1988)) suggests that CRA clients may have the right to file a non-meritorious (that is, frivolous) final CRA appeal. There may even be a right to file a non-meritorious interlocutory CRA appeal under G.L. c. 119, § 39I. Before doing so, counsel should contact their panel director or, if staff, their managing director, or designee, in order to discuss the case and, if possible, help find meritorious issues. If counsel decides to file a non-meritorious petition, counsel should do so under the procedures set forth in Moffett and the Appeals Court's official guidance on Moffett briefs, see <https://www.mass.gov/service-details/procedures-governing-appeals-with-moffett-issues-filed-in-the-appeals-court>.

- b. *Appeal of Single Justice Order.* Trial counsel shall, where appropriate, appeal an adverse order by the single justice to a full panel of the Appeals Court. In the event counsel elects to appeal an order of a single justice, or if the single justice reports his or her decision to the full appellate court, counsel shall promptly:
  - i. Contact the CAFL Appellate Panel Support Unit for the assignment of certified appellate counsel to work on the appeal; and
  - ii. Provide copies of all papers filed in the appellate court that were not already provided for Standard 9.1(a), supra.

Following issuance of the judgment, counsel shall continue to represent the client in accordance with Standards 1.3 and 1.5. Counsel shall also continue to represent the client at all appropriate administrative and foster care reviews, as well as in meetings with probation and school personnel. Where appellate counsel has been assigned, trial counsel shall notify appellate counsel of any activity in the trial court and any other significant event.

**Commentary:** Counsel continues to represent the client in the trial court when an appeal is pending. Trial counsel's appointment continues after the filing of an appeal and appointment of appellate counsel. After the appeal has been docketed in the Appeals Court or SJC, trial counsel may not file certain pleadings in the trial court which seek to affect the judgment absent leave of the appellate court. Counsel should notify appellate counsel of the need to proceed in the trial court and request that appellate counsel seek the appropriate leave of court.

## 9.2. Cessation of Representation

- a. *Conclusion of case:* In the event a case concludes by one of the events described in Standard 1.3 above, counsel shall notify the client and explain the meaning and ramifications of case conclusion.
- b. *Withdrawal from case:* In the event counsel seeks to withdraw from a case, counsel shall move the court for successor counsel for the client. Counsel shall provide the client with notice of the hearing, and upon the client's request, a copy of the motion. Counsel shall, to the extent practicable, avoid disclosing confidential information and information adverse to the client in any motion to withdraw or any hearing thereon. If successor counsel is named, counsel shall promptly cooperate with successor counsel, including turning over the file in a timely manner. In the event the court determines not to appoint successor counsel, counsel should advise the court and opposing counsel of the client's address, unless otherwise directed by the client.

**Commentary:** In situations where parent's counsel is withdrawing at the parent client's request, counsel should advise the parent client that the court may decline to appoint substitute counsel unless the client can demonstrate good cause. See Adoption of Olivia, 56 Mass. App. Ct. 670, 673-75 (2001). Note that if a child client seeks new counsel, they should be appointed a new attorney because G.L. c. 119, § 39F provides a right to counsel for children at all hearings.

It is very important that *pro se* clients receive the same pleadings and notices as are served on counsel. If counsel is withdrawing from a case involving domestic violence or that presents other safety concerns for the client, counsel may not wish to disclose the client's address to other counsel or other *pro se* litigants. In such circumstances, counsel should, contemporaneously with the motion to withdraw and (if possible) after discussion with the client, (a) file a motion to impound the client's address and (b) unless the client provides the court with the completed appointment of agent form, ask the court and remaining counsel to provide the client with notices of any hearings scheduled and copies of any pleadings filed or orders entered.

- c. *Striking counsel's appearance:* In the event the court strikes counsel's appearance, and no successor counsel is appointed, counsel should advise the court and opposing counsel of the client's address, unless otherwise directed by the client. Counsel should determine if there is any legal basis to appeal the striking of counsel if the client wishes counsel to remain on the case. See Standard 9.1, supra.

**Commentary:** Counsel should follow the commentary set forth in Standard 8.3(b) of the Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases.

**P. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CLIENTS IN CHILD WELFARE APPEALS**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training staff and private counsel assigned pursuant to G.L. c. 211D. With respect to staff, the term “relevant Director” used below refers to the Managing Director or her/his designee; with respect to private counsel, the term “relevant Director” refers to the Director of Appellate Panel or his/her designee. The terms “counsel” and “appellate counsel” used below refer to both staff and private counsel unless otherwise specified.

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## 1. PERFORMANCE STANDARDS AND OTHER REQUIREMENTS

- a. **Performance Standards.** Appellate counsel shall comply with these Performance Standards *and* with all applicable [Performance Standards Governing Representation of Children and Parents in Child Welfare Cases](#) (“Trial Standards”) as set forth in the CPCS Assigned Counsel Manual.
- b. **Assigned Counsel Manual.** Appellate counsel shall comply with all requirements set forth in the CPCS Assigned Counsel Manual, including but not limited to continuing education requirements.
- c. **Mentor Program Requirements.** If private counsel has a mentor, he or she shall comply in all respects with the CAFL Appellate Mentor Program Requirements, which are incorporated in these Performance Standards by reference and may from time to time be revised.
- d. **Massachusetts Rules of Appellate Procedure.** Appellate counsel shall comply in all respects with the Massachusetts Rules of Appellate Procedure.

## 2. ROLE AND DUTIES OF APPELLATE COUNSEL

- a. **Diligence, Zeal and Loyalty.** The role of appellate counsel is to diligently and zealously defend and protect the client’s rights and interests through the appellate process on all matters within the scope of counsel’s assignment. It is counsel’s duty to give the client undivided loyalty free of any conflicts of interest and to maintain the confidentiality of all client communications. Counsel’s commitment to these duties and obligations must remain unaffected by the client’s indigent status, the client’s background or the nature of the case.
- b. **Representation at Trial and Appellate Levels.**
  - i. **Private Counsel.** Private counsel who has represented a parent or child at the trial level and is certified or permitted to take appellate assignments may represent the client on appeal only if that client is an appellee for appellate purposes. In extraordinary circumstances, the CAFL Director of Appellate Panel may permit private counsel, upon written request, to continue to represent a client on appeal who is an appellant for appellate purposes.
  - ii. **Staff Counsel.** Staff appellate counsel may represent a parent or child on appeal who was represented at the trial level by staff trial counsel, regardless of whether the client is an appellee or an appellant. However, if the client is an appellant and asks to be represented by private appellate counsel on appeal

- iii. or raises the issue of ineffective assistance of counsel, staff counsel will contact the CAFL Director of Appellate Panel, who will assign the case to private counsel. In addition, if staff appellate counsel is assigned to represent an appellant and determines, based on his or her independent review of the record, that staff trial counsel may have ineffectively assisted the client, staff appellate counsel shall contact the CAFL Director of Appellate Panel, who will assign the case to private counsel.
- iv. **Children's Change of Position.** If private or staff counsel continues to represent a child client on appeal and the child changes his or her position from that advanced at trial, counsel shall contact the relevant Director. If impending deadlines render the assignment of successor counsel impracticable and the relevant Director permits counsel to continue to represent the child client, then the representation shall continue. Otherwise, counsel shall withdraw and the CAFL Director of Appellate Panel shall assign new counsel for the child client.

### 3. INITIAL OBLIGATIONS OF APPELLATE COUNSEL

Immediately upon assignment, appellate counsel shall: (a) file an appearance in the appropriate court; (b) communicate with the client, if appropriate for the client's age, to inform the client of the assignment; (c) communicate with trial counsel to inform them of the assignment, provide them with copies of appellate counsel's appearance, and request information and materials necessary for the appeal; and (d) determine whether a stay of the judgment or decree of the trial court should be sought pending appeal. If a stay should be sought, counsel shall immediately seek one in accordance with Mass. R. App. P. 6.

As soon as practicable, appellate counsel shall review the trial court file and make necessary copies of docket sheets, exhibits, pleadings, and other relevant records.

**Commentary:** The trial courts have different procedures for allowing appellate counsel to view and copy the file. Appellate counsel should call the clerk's office to determine that court's procedure. Note that copies of exhibits from trial counsel's file may not match the actual exhibits admitted in evidence; the clerk, the judge, or the party offering the exhibits may have redacted or otherwise altered them. Accordingly, appellate counsel should review all exhibits carefully before relying on them for briefing or including them in a record appendix.

### 4. SCREENING ASSIGNMENTS

From time to time, private counsel may receive an assignment outside of the ordinary

appellate process, for example, to evaluate the legal merits of a motion for new trial or for relief from judgment on behalf of a client who has not appealed the trial court's judgment. In such cases, counsel shall not file an appearance in the trial court but shall communicate with the client consistent with these Performance Standards, investigate the merits of the action, and submit a brief written report to the Director of Appellate Panel. The Director of Appellate Panel may authorize further action consistent with the report, terminate the assignment, or give appellate counsel other instructions. Counsel shall not file an appearance in the trial court unless authorized by the Director of Appellate Panel as the Chief Counsel's designee.

## **5. INITIAL MEETING WITH CLIENT**

Appellate counsel shall make all reasonable efforts to meet with the parent or child client within one week after receipt of the assignment but in no event later than two weeks following receipt of the assignment. If the client is an adult, the initial meeting shall be in person, unless the client specifically requests to meet or communicate in another manner. If the client is a child, the initial meeting shall be in person at the child's residence (unless the child specifies an alternative location). As soon as practicable, appellate counsel shall determine the client's position and goals in the appeal. Appellate counsel shall independently determine their client's position and goals on appeal – and shall do so throughout the representation – as set forth in Trial Standards 1.6 (Determining and Advocating the Child Client's Position) and 1.7 (Determining and Advocating an Adult Client's Position) and should be aware of the potential for conflicts as set forth in Trial Standard 1.4 (Conflicts of Interest). Appellate counsel may only substitute judgment for a child client if the requirements of Trial Standard 1.6 are satisfied.

Appellate counsel is not bound by a determination of the client's position and goals made by trial counsel. Appellate counsel shall, however, consult trial counsel in an effort to jointly determine the client's position and goals on appeal. If appellate counsel and trial counsel cannot agree on a position on behalf of the client, they shall together contact and consult the relevant Director, who may require that both counsel withdraw from the representation. If a private attorney represents the client at trial and a staff attorney represents the client on appeal, or if a staff attorney represents the client at trial and a private attorney represents the client on appeal, together they may contact either Director.

The requirements for meeting the client may only be waived with advanced approval of the relevant Director or their designee.

**Commentary:** Appellate counsel and trial counsel must have the same position for a child client. If there is a difference of opinion regarding the child's position, no action should be taken (including the filing of any motions) in the trial or appellate courts by either lawyer until their positions have been harmonized or the relevant Director(s) or their designees have provided guidance. While the positions of trial and appellate counsel for parent clients are almost always consistent, there may be conflicts regarding

strategy. If trial and appellate counsel cannot resolve such conflicts, appellate counsel should consult with the relevant Director(s) or their designees.

## 6. ONGOING COMMUNICATIONS WITH CLIENT

In all cases, appellate counsel must maintain sufficient contact with the client to establish and maintain an attorney-client relationship that will enable appellate counsel to keep abreast of the client's interests and needs and of the client's position in the appeal. Appellate counsel shall remain in communication with the client during the course of the appeal to discuss, to the extent possible given the client's age and abilities, the progress of the appeal, appellate strategy, negotiation and settlement strategies, and appellate goals. Appellate counsel shall keep the client informed of all significant developments in the client's appeal. Appellate counsel shall respond in a timely manner to all communications from the client provided that such communications are of a reasonable volume and at reasonable intervals. When the client's capacity to make adequately considered decisions in connection with the appeal is diminished – whether the client is a child or an adult (*see* Mass. R. Prof. C. 1.14) – appellate counsel shall, as far as reasonably possible, maintain a normal client-lawyer relationship in terms of communication throughout the appellate representation.

Appellate counsel shall meet with a parent or child client in person upon the client's request; if appellate counsel is unwilling or unable to do so, they must contact the relevant Director for guidance. Appellate counsel may be required to withdraw from the representation so that CAFL Administration can appoint new appellate counsel.

While appellate counsel need not meet with a child client quarterly or upon the circumstances set forth in Trial Standards 1.5(b) and (c) (Communications with Client), appellate counsel must, as noted above, communicate with the child to the extent necessary to maintain a normal attorney-client relationship. Appellate counsel for a child must, after the initial meeting, meet with the client and consult regarding the client's position and goals (a) after any placement change; (b) before counsel drafts the brief; (c) shortly before oral argument; and (d) at the close of the appeal in order to explain the resolution of the appeal to the client (if appropriate given the child's developmental level). Such meetings must be in person unless the child client specifically requests to meet or communicate in another manner or appellate counsel obtains advanced permission from the relevant Director(s) or their designees.

**Commentary:** Most meetings with a child client after the initial meeting are to keep abreast of the child's position and circumstances in the event they change during the appellate process. If appellate counsel lets a long-time lapse and does not meet with the child until *after* filing a brief, and the child's position has changed, appellate counsel may have to withdraw that brief and file a new one (if the appellate court even permits it). Further, some appellate justices ask counsel at oral argument when they last met with their child clients and whether the child's status and position have changed since briefing. Appellate counsel should have that information available (notwithstanding that some of it may be "outside the record"). Note that appellate counsel should look to Trial Standards 1.5 and 1.6 and their Commentary for guidance regarding the manner, nature, and importance of client contact.

## 7. COMMUNICATIONS WITH TRIAL COUNSEL

Appellate counsel shall promptly respond to trial counsel's calls, emails, and other communications. Unless trial counsel has withdrawn, appellate counsel shall:

- inform trial counsel of all significant developments in the case, including proposed settlement of the case, trial motions (as set forth in 9 below), dismissal of the appeal, docketing of the appeal in the appellate court, and the resolution of the appeal;
- cooperate with trial counsel in furtherance of the client's position and goals in the proceeding, see Trial Standards 8.1(d);
- promptly notify trial counsel when their assistance is no longer needed in furtherance of the appeal or when the client's appellate brief has been filed, see Trial Standards 1.3(a)(ix);
- provide to trial counsel a copy of the brief(s) filed on the client's behalf, as well as the decision(s) of the appellate courts. If requested, appellate counsel shall also provide trial counsel a copy of the other briefs filed in the case; and
- notify trial counsel of the date and location of oral argument.

If appellate counsel and trial counsel for a child client have different positions for the client, they shall attempt to reconcile their differences and reach a unified position. If such attempts are unsuccessful, appellate counsel shall contact the Appellate Panel Director or their designee for instruction. Appellate counsel shall not file any motions regarding the disputed position until a positional conflict with trial counsel has been resolved.

If appellate counsel is staff, appellate counsel shall contact and obtain instruction from the CAFL Managing Director or their designee instead of the Appellate Panel Director for the purposes of this Standard.

*Commentary:* When requesting information and documents from trial counsel – whether from trial counsel's file or at the trial court – appellate counsel shall be respectful and sensitive to the demands of trial counsel's schedule.

## 8. TRANSCRIPTS

Appellate counsel shall ensure that transcripts of the trial and all other necessary court dates have been specified by trial counsel and ordered by the trial court clerk's office consistent with Mass. R. App. P. 8(b)(5). Appellate counsel for an appellant shall review the entire transcript within three weeks after receipt from the transcriber, the court or other counsel. Appellate counsel for an appellant shall, within one week of

receipt of the transcripts, provide a photocopy of the transcripts to other appellate counsel, including privately retained appellate counsel (if any) and appellate counsel for the Department of Children and Families, if so requested. All appellate counsel shall ensure that only one copy of the transcripts is ordered from the transcriber. If the clerk is ordering the transcripts, counsel for the appellant shall request that the clerk order only one copy from the transcriber.

## 9. MOTIONS

Appellate counsel shall timely file in the appropriate court all motions necessary or advisable to preserve and perfect the client's appellate rights. Appellate counsel who are not assigned to represent the client in the trial court shall not engage in motion practice in the trial court unless such motion practice relates to assembly of the record, a stay pending appeal, dismissal of an appeal, or a request for new trial, relief from judgment or other form of post-trial relief relevant to the appeal. Appellate counsel may, with prior authorization from the relevant Director, file and argue other motions. Appellate counsel shall not file a motion for post-trial relief based on changed circumstances of the parties without prior approval of the relevant Director.

## 10. ISSUES ON APPEAL

- a. ***Meritorious Issues.*** Appellate counsel shall pursue all meritorious issues for appeal unless there are tactical reasons for not doing so and the client consents.
- b. ***Ineffective Assistance/New Trial Motions.*** If appellate counsel determines that IAC should be raised as an issue on appeal, appellate counsel shall determine if a motion for relief from judgment is necessary to preserve the issue for appeal. If such a motion is necessary, appellate counsel shall file a motion for relief from judgment in the trial court or, if the appeal has already been docketed, seek leave of the single justice to file a motion for relief from judgment in the trial court. Appellate counsel shall obtain an affidavit from trial counsel (see Trial Standard 8.1(f)(iii)), as well as affidavits from other potential witnesses necessary to the IAC claim. Appellate counsel shall participate in any evidentiary hearing granted on the post-trial motion rather than "rest on the pleadings." If appellate counsel is not certified to accept trial assignments, appellate counsel shall contact the CAFL Trial Panel Director to obtain a trial mentor to advise appellate counsel on the matter. If appellate counsel is CAFL staff, they shall contact the Managing Director or their designee for instructions. Appellate counsel shall send a copy of the motion for relief from judgment to the Director of Appellate Panel or Managing Director or their designee as soon as practicable after filing the motion.
- c. ***Moffett Briefs.*** If the client insists that appellate counsel brief a contention that, in the judgment of appellate counsel, cannot be supported by any rational argument,

- d. appellate counsel shall (a) immediately inform and consult the relevant Director; (b) inform the client of the client's rights with respect to such contention pursuant to Commonwealth v. Moffett, 383 Mass. 201 (1981), and Care and Protection of Valerie, 403 Mass. 317 (1988); (c) provide the client with a copy of the Moffett and Valerie opinions; and (d) if the client thereafter wishes to invoke his or her Moffett rights with respect to such contention, comply in all respects with the guidelines set forth in Moffett, 383 Mass. at 208-09 & n. 3.

## **11. DIRECT APPELLATE REVIEW**

Appellate counsel may, in his or her discretion, seek Direct Appellate Review (DAR) to the Supreme Judicial Court (SJC). Appellate counsel shall provide a copy of the DAR application to the relevant Director.

## **12. BRIEFS**

Appellate counsel shall file a brief on the client's behalf. The brief of appellate counsel shall be of high quality and shall conform in all respects with the applicable Rules of Appellate Procedure. Appellate counsel may join in the brief of another party with respect to certain arguments without the need for permission. Appellate counsel may join in the brief of another party in full, or may by letter support the brief of another party, only with advanced permission of the relevant Director.

## **13. COPY OF BRIEFS TO CLIENT**

Appellate counsel shall send the client, if appropriate for the client's age, one copy of any brief or reply brief filed on the client's behalf. Appellate counsel shall also send the client, if appropriate for the client's age, a letter offering to provide the client with copies of the briefs of other parties and copies of all other substantive documents pertaining to the appellate proceedings. If the client requests copies of these materials, counsel shall provide them forthwith.

## **14. COPY OF BRIEFS TO CAFL DIRECTOR OF APPELLATE PANEL**

Private appellate counsel shall send to the Director of Appellate Panel either an unbound hard copy or a scanned PDF or Word version of any brief or reply brief filed on the client's behalf.

## **15. ORAL ARGUMENT**

Appellate counsel shall inform the client, if appropriate for the client's age, of the date, time and place scheduled for oral argument of the appeal as soon as appellate counsel receives notice of the argument from the appellate court. Appellate counsel shall not

waive oral argument, either prior to or at the argument, absent the express consent of the client and approval of the relevant Director.

#### **16. DECISION OF APPELLATE COURT**

Appellate counsel shall promptly inform the client, if appropriate for the client's age, of the decision of the appellate court. Appellate counsel shall send a copy of the decision to the client, if appropriate for the client's age, and to the relevant Director.

#### **17. FURTHER APPELLATE REVIEW**

If the decision of the Appeals Court is adverse to the client, appellate counsel shall promptly inform the client, if appropriate for the client's age, of his or her right to apply to the SJC for further appellate review (FAR). Unless the client instructs appellate counsel not to do so, appellate counsel shall prepare and timely file the application with the SJC. When the SJC has ruled on the application for FAR, appellate counsel shall promptly inform the client, if appropriate for the client's age, of the ruling by letter.

#### **18. FEDERAL APPELLATE REVIEW**

Appellate counsel must obtain the approval of the client and the CPCS Chief Counsel before seeking appellate review in the federal appellate courts. Whether or not to seek the approval of the Chief Counsel for federal appellate review is reserved to counsel's discretion. Any letter to the Chief Counsel must (a) set forth the procedural history of the case, the issues in the appeal, and why those issues are appropriate for federal review, and (b) also be sent to the relevant Director. Approval of the Chief Counsel is subject to his or her discretion.

#### **19. CONCLUSION OF REPRESENTATION**

Appellate counsel's representation of the client ends as of the earlier of (a) withdrawal of the appeal; (b) dismissal of the appeal, absent appeal from such dismissal; (c) entry of an order striking appellate counsel's appearance, absent appeal from such order; *or* (a) final resolution of the appeal.

If the appeal results in remand for a new trial, in whole or in part, appellate counsel shall not represent the client in the trial proceedings unless (a) the client consents; (b) appellate counsel is certified for CAFL trial representation; (c) trial counsel consents, or the new trial is based on trial counsel's ineffective assistance, and trial counsel is permitted by the trial court to withdraw; *and* (d) the trial court appoints appellate counsel to represent the client in the trial proceedings. The Director of Appellate Panel may, in his or her discretion, re-open a Notice of Assignment of Counsel for private counsel that has been closed pursuant to this section.

## **Q. PERFORMANCE STANDARDS GOVERNING MINORS SEEKING JUDICIAL CONSENT FOR ABORTION**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

These standards describe the steps which should be taken by an attorney assigned to represent a minor petitioning for authorization for an abortion pursuant to M.G.L. c. 112, § 12S. They must be utilized in association with the training manual prepared by the Judicial Consent for Minors Lawyer Referral Panel and the Committee for Public Counsel Services and the required training program, which describe in detail the law and procedure governing hearings under this statute.

1. The role of the attorney in a Massachusetts G.L. c. 112, § 12S hearing is to act as legal counsel for the minor petitioner in seeking approval of the petition, and to ensure the petitioner is afforded all her due process, privacy and other rights.
2. Immediately upon request to represent a petitioner, the attorney shall make any arrangements necessary to communicate with or to allow the client to communicate with him/her, including leaving with the person assigning the case and with the attorney's office staff, if any, directions on how and when the attorney can be best reached. The attorney shall also determine the earliest practicable time when a hearing may take place, taking into account all information supplied by the person assigning the case as to the client's availability for said hearing. If the attorney's own schedule does not permit her/him to promptly handle the matter the attorney shall decline to represent the petitioner. In all cases the attorney shall notify the referring agency of her/his inability to handle the matter as soon as possible.
3. The attorney should make all efforts to communicate with the petitioner as soon as possible, but at least within forty-eight (48) hours of accepting the case. The attorney must carefully follow any instructions given by the person or agency referring the case as to how to safely contact the petitioner (i.e., times to call, whether or not to leave any message). In the majority of cases, the attorney may not be able to initiate contact with the client, and must therefore make all efforts to be available when the client initiates communication, including leaving with the person or agency

4. assigning the case and with the attorney's office staff, if any, directions on how and when the attorney can best be reached; giving permission for office staff to accept collect calls; and providing alternative methods by which the attorney could be reached, including cell phone numbers, and, if the attorney is willing, home telephone numbers.

If the attorney is unable to contact the petitioner or is not contacted by the petitioner within forty-eight (48) hours of accepting the case, the attorney must contact the person or agency who referred the case to determine if there has been any further contact by the petitioner and/or if there is any new information concerning how to contact the petitioner.

5. At the initial consultation, which initiates the lawyer-client relationship, the attorney shall:
  - a. explain the M.G.L. c. 112, § 12S (judicial consent law) and legal procedures to the client;
  - b. determine the reasons for seeking judicial consent;
  - c. determine those factors which indicate or illuminate the minor's maturity and/or the minor's best interest;
  - d. determine how the client knows of her pregnancy and what the length of her pregnancy is; and
6. determine the client's understanding of the nature of the legal proceeding and medical proceeding. If a hearing has not been scheduled at the time of the initial contact, or if the petitioner cannot attend the scheduled hearing, the attorney should immediately reschedule the hearing, preferably while the client is still immediately accessible. Should the attorney be unable to obtain a hearing within seventy-two (72) hours (other than by request of the client) the attorney shall contact the Office of the Chief Justice of the Superior Court to make arrangements for a hearing.
7. The attorney shall thoroughly investigate the relevant facts through a complete discussion with the client. Contact with any other person should be made only at the request of or with the permission of the client.
8. The attorney shall make certain that the client is aware of the exact location of the court where the hearing is to be held, and the exact place that the attorney and client will meet, giving directions, if needed. If there is any question as to the client's understanding of either location, the attorney shall request that the client describe to the attorney her understanding of the location. The attorney shall make sure that s/he and the client have appropriate information so that they can identify one another. The attorney shall also make certain the client has some form of transportation to the court.

9. The attorney shall determine from the clerk assigning the hearing whether any particular information or documents are required by the judge for the hearing (e.g., written pregnancy test results, ultrasound) and shall take all steps necessary to obtain the information.
10. The attorney shall determine that the client has received appropriate counseling as to the relevant abortion procedures and risks. If the attorney feels that the client has not received this counseling s/he shall provide the client with information on where such counseling can be obtained.
11. At or before the hearing the attorney shall prepare the necessary court papers and take all steps to ensure the client's privacy.
12. At all times the attorney shall do everything necessary to protect the confidentiality of the client.
13. At the hearing the attorney shall act as a zealous advocate for the client, insuring that the proper procedures are followed and that all information concerning maturity, and if necessary, best interest, is placed on the record.
14. After the hearing the attorney shall make sure the client has all necessary papers so that an abortion can be performed and that the client knows how to contact the attorney if any problems arise.
15. Should the petition be denied the attorney shall immediately file a notice of appeal and take all steps to expedite an appeal within forty-eight (48) hours. The attorney shall also, in any case, immediately contact a member of the Judicial Consent for Minors Lawyer Referral Panel steering committee.

If an attorney has accepted a case but cannot attend the hearing because of illness or other serious problems, the attorney shall be responsible for obtaining appropriate substitute counsel trained to represent clients in these cases, appraising substitute counsel of all necessary information and, if possible, contacting the client with this information. If the attorney is unable to obtain such counsel on his/her own, s/he shall immediately contact the person or agency who referred the case to arrange for such qualified substitute counsel. If this cannot be done because of time constraints or evening hours, counsel shall contact one of the attorneys listed in the front of the Judicial Consent For Minors Training Manual to arrange for appropriate substitute counsel. At no time is it appropriate for the attorney to inform the client that it is his/her responsibility to arrange for substitute counsel.

## **R. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF INDIGENT PERSONS IN SEX OFFENDER REGISTRY BOARD AND SEXUALLY DANGEROUS PERSON CIVIL COMMITMENT APPEALS**

These standards are intended for use by the Committee for Public Counsel Services (CPCS) in evaluating, supervising, and training counsel assigned pursuant to G.L. c. 211D. Assigned counsel must comply with these standards and the Massachusetts Rules of Professional Conduct.

Specifically, these standards describe what is minimally expected of an attorney who is assigned by the Alternative Commitment and Registration Support Unit (ACRSU) to appear before the appellate courts. There are two types of civil appeals assigned by the ACRSU. First, there are appeals of a final registration and classification determination by the Sex Offender Registry Board (SORB) and the Superior Court review thereof pursuant to G.L. c. 6, §§ 178C-178P and G.L. c. 30A *et seq.* Second, there are appeals of civil commitments as a sexually dangerous person (SDP) pursuant to G.L. c. 123A, §§ 9 or 12.

### **PERFORMANCE STANDARDS AND OTHER REQUIREMENTS**

- a. **Performance Standards.** Appellate counsel shall comply with these Performance Standards and with all applicable Performance Standards Governing the Representation of Indigent Persons in Trials of Sexually Dangerous Person Civil Commitments and Performance Standards Governing the Representation of Clients in Sex Offender Registry Board Proceedings (“Trial Standards”) as set forth in the CPCS Assigned Counsel Manual.
- b. **Assigned Counsel Manual.** Appellate counsel shall comply with all requirements set forth in the CPCS Assigned Counsel Manual, including but not limited to continuing education requirements.

### **Rules Concerning Zealous Advocacy**

#### **Standard 1**

The role of the attorney is to diligently and zealously represent the client’s substantive and procedural rights and interests through the appellate process on all matters within the scope of appellate counsel’s assignment. It is appellate counsel’s duty to give the client undivided loyalty free of any conflicts of interest, and to maintain the confidentiality of all client communications. Appellate counsel’s commitment to these duties and obligations must remain unaffected by the client’s sex, race, color, creed, national origin, indigent status, age, gender identity, sexual orientation, or background. Appellate counsel also must remain unaffected by the nature of the case, particularly where every ACRSU client has been convicted of a sex offense.

## **Rules Concerning Compliance with Rules of Court**

### Standard 2

Appellate counsel shall comply with all court rules and standing orders, including: the rules of civil procedure, the rules of appellate procedure, Superior Court standing orders, the rules and standing orders of the Massachusetts Supreme Judicial Court, and the rules and standing orders of the Massachusetts Appeals Court. The brief shall properly preserve constitutional arguments under the Federal Constitution and the Massachusetts Declaration of Rights.

## **Rules Concerning Knowledge of Law and Science**

### Standard 3

Appellate counsel in SORB matters shall be familiar with relevant statutes, regulations, and decisional law including but not limited to: G.L. c. 6, §§ 178C-178P; G.L. c. 30A *et seq.*; and 803 CMR 1 *et seq.*

Appellate counsel in SDP matters shall be familiar with relevant statutes, regulations, and decisional law including but not limited to G.L. c. 123A *et seq.*

### Standard 4

Appellate counsel shall be sufficiently knowledgeable of the scientific literature regarding sexual disorders and recidivism risk assessment to undertake an informed and critical review of the record in the case. The literature is fundamental to both SORB and SDP matters.

## **Rules Concerning Mentors**

### Standard 5

Mentors are assigned to appellate counsel new to the SORB and SDP appellate panels. Appellate counsel will be mentored for at least the first three appellate assignments. Appellate counsel shall confer with the mentor about issues of law that may be raised on the client's appeal and provide the mentor with a copy of transcripts and other case documents. The mentee must provide a brief to the mentor prior to filing the brief and may only file the brief after the mentor authorizes the filing.

## **Rules Concerning Client Communications**

### Standard 6

Within three days after receipt of the assignment of a case the attorney shall communicate with the client to inform the client of the assignment.

### Standard 7

Appellate counsel shall keep the client informed of all significant developments in the case. Appellate counsel shall respond in a timely manner to all correspondence from the client, provided that such correspondence is of a reasonable volume and at a reasonable interval.

#### Standard 8

Appellate counsel is expected to accept a reasonable number of telephone calls, including collect calls. If appellate counsel is not available, his or her office may accept the calls and arrange a time when appellate counsel will be able to talk to the client. Appellate counsel may send the client a letter indicating dates and times when appellate counsel will be available to accept calls.

#### Standard 9

After reading the transcript, the appellate counsel shall visit the client at the institution at which the client is incarcerated, or, if the client is not incarcerated, shall speak with the client in person, for the purpose of conferring with the client about the issues that may be raised on the client's appeal. After reading the transcript, appellate counsel shall confer with the client about the issues which may be raised on the client's appeal. If the client requests, appellate counsel must provide the client with a copy of the transcripts.

#### Standard 10

Regarding SORB appeals, SORB cases are distinct from criminal cases because the Board can proceed without a client's presence. Doe, No. 941 v. SORB, 460 Mass. 336 (2011). If appellate counsel is unable to contact the client, appellate counsel shall appeal the Superior Court decision. In the situation where a client may suffer worse consequences by appealing a Superior Court decision, withdrawing an appeal can be reasonable. In those circumstances, appellate counsel shall contact ACRSU prior to withdrawing an appeal.

#### Standard 11

If either a conflict arises or the communication with the client irretrievably breaks down and the client requests new counsel, appellate counsel shall contact the ACRSU regarding withdrawal. Appellate counsel shall continue representing the client until a motion to withdraw has been allowed. A motion to withdraw that has been allowed by the court must be transmitted to the ACRSU immediately for the assignment of new counsel. Appellate counsel shall cooperate with subsequent counsel in order to prevent any harm to the client and shall provide subsequent counsel the case file.

#### Standard 12

At the client's request, appellate counsel shall transmit to the client a copy of the brief filed on the client's behalf and copies of all other substantive documents pertaining to the appellate proceedings.

#### Standard 13

Appellate counsel shall inform the client of the date, time and place scheduled for oral argument of the appeal as soon as notice is received from the appellate court.

#### Standard 14

Appellate counsel shall inform the client of the decision of the appellate court promptly after appellate counsel receives notice thereof and shall transmit to the client a copy of the decision without delay.

### **Rules Concerning Case Procedure**

#### Standard 15

Within three days after receipt of the assignment of a case the attorney shall file an appearance and promptly begin work on the case.

#### Standard 16

Within one week after assignment of a case the attorney shall request the case file from trial, hearings, and prior appellate counsel. Trial, hearings, and prior appellate counsel are obligated to cooperate with appellate counsel and must provide the case file under these performance guidelines, under the performance guidelines for sexually dangerous person trials (Guideline 28), and under the performance guidelines for Sex Offender Registry Board proceedings (Guideline 5.2[i]).

#### Standard 17

Regarding SDP appeals, within one week after assignment of a case the attorney shall determine if a G.L. c. 123A, § 9 petition has been filed on the client's behalf. If a petition has not been filed, counsel shall guarantee a petition for examination and discharge is filed unless the client directs the attorney not to file a petition.

#### Standard 18

Appellate counsel shall cure any unreasonable delay in the production and assembly of the record on appeal. Such measures include contacting the court clerk or court administration and, if necessary, seeking a court order to cure unreasonable delay. After review of the record, appellate counsel shall determine whether the record is accurate and complete. Appellate counsel shall take such steps as may be necessary to correct any errors or omissions.

#### Standard 19

Within three weeks after receipt of the transcript, appellate counsel shall have read the entire transcript of the case. After reading the transcript, appellate counsel shall confer with the client and with trial counsel about the issues which may be raised on the client's appeal. Appellate counsel should consider whether a claim of ineffective assistance of trial counsel may form the basis of an appeal. See Care and Protection of Stephen, 401 Mass. 144 (1987) and

Commonwealth v. Ferreira, 67 Mass. App. Ct. 109 (2006).

#### Standard 20

Upon receiving notice of the assembly of the record, appellate counsel shall take the necessary steps to ensure the timely docketing of the appeal and shall, where necessary, file appropriate motions for leave to proceed *in forma pauperis* or for waiver of fees and costs.

#### Standard 21

The following issues are specific to SORB Cases:

- A. Appellate counsel must discuss with the client whether to appeal the decision of the Superior Court to the Appeals Court. If the classification decision remains Level 3 after an appeal to the Superior Court, then appellate counsel should advise a client to appeal unless **extraordinary circumstances** are present. In general, appellate counsel should also advise a client to appeal a Level 2 classification because, at present, a Level 2 classification also calls for internet dissemination, making it almost no different in effect from a Level 3.
- B. Within three days after receipt of the assignment of a case, the attorney shall determine whether a stay of a judgment or of an order of the lower court should be sought pending appeal. In the event a stay should be sought, appellate counsel shall immediately seek one in accordance with Mass. R. A. P. 6.
- C. A transcript of Superior Court proceedings in which new evidence was admitted should ordinarily be sought. Appellate counsel is responsible to ensure such transcripts are added to the appellate record. Mass. R. A. P. 8(b)(1).
- D. If oral argument on the motion for judgment on the pleadings addressed any issues that were not raised in the filed papers, or if other events that occurred at oral argument are pertinent to the appeal, appellate counsel should order a transcript of the argument of the motion for judgment on the pleadings, pursuant to Mass. R. A. P. 8(b)(1).

#### Standard 22

Regarding SDP appeals, appellate counsel shall be aware of McIntire, petitioner, 458 Mass. 257 (2010), where the Supreme Judicial Court decided that subsequent § 9 trials may prevent the release of a client even in the event that an appellate court finds § 9 trial error. Even when relief is limited, appellate review of the merits of a case may result in new law or provide guidance for the client in future trials. Appellate counsel shall discuss § 9 trial schedules with the client and with appointed trial counsel. If appellate counsel does not believe that an appeal can be decided prior to a subsequent § 9 trial, that McIntire applies, and that there is no likelihood of success on the merits, appellate counsel shall confer with the client, trial counsel, and the ACRSU prior to dismissing an appeal.

#### Standard 23

Appellate counsel must be familiar with Commonwealth v. Moffett, 383 Mass. 201 (1981). If at any time the client insists on having an issue briefed which, in appellate counsel's judgment, cannot be supported by any rational argument, appellate counsel shall immediately consult with the ACRSU. If advised, appellate counsel should (a) inform the client of the client's rights pursuant to Moffett; (b) supply the client with a copy of the Moffett opinion; and (c) if the client wishes to invoke his or her Moffett rights, comply in all respects with the guidelines set forth in Moffett. See also Care and Protection of Valerie, 403 Mass. 317 (1988).

#### Standard 24

If the Supreme Judicial Court issues an amicus announcement in the client's case, appellate counsel shall immediately notify the ACRSU.

#### Standard 25

Oral argument of the appeal shall not be waived, absent unusual circumstances. Argument shall not be waived without the approval of the client and the ACRSU.

#### Standard 26

If appellate counsel is unable to fulfill any of these requirements, appellate counsel shall decline the assignment.

### **Rules Concerning Procedures after Decision**

#### Standard 27

Appellate counsel shall transmit to the ACRSU a copy of the decision without delay.

#### Standard 28

If a decision of the Massachusetts Appeals Court is adverse to the client, in whole or in part, appellate counsel shall promptly inform the client regarding applications to the Supreme Judicial Court for further appellate review of the case. Unless the client instructs appellate counsel not to do so, appellate counsel shall prepare and file such applications within the time prescribed by the Massachusetts Rules of Appellate Procedure and Supreme Judicial Court standing orders. If a decision is favorable in part and adverse in part, appellate counsel shall file an application for limited further appellate review pursuant to Commonwealth v. Burno, 396 Mass. 622 (1986). If the client is unavailable and appellate counsel believes further appellate review may harm the client's interests, appellate counsel is to confer with the ACRSU.

#### Standard 29

In the event that the client's appeal is unsuccessful, appellate counsel shall have the discretion, if requested by the client and approved by the ACRSU, to seek relief in the federal courts when in the best judgment of the appellate counsel there exists a reasonable likelihood that such relief

may be obtained by appeal or petition. In any case in which federal relief is potentially available but the appellate counsel has not been approved to continue representation, appellate counsel shall explain to the client the requirements for proceeding in federal courts.

Standard 30

Regarding SORB appeals, appellate counsel should inform the client of the client's right to file a written motion with the SORB requesting reclassification or early termination.

## **S. PERFORMANCE STANDARDS GOVERNING REPRESENTATION OF CLIENTS IN JUVENILE APPEALS AND OTHER POST-TRIAL MATTERS**

These standards are intended for use by the Youth Advocacy Division (YAD) of the Committee for Public Counsel Services (CPCS) in evaluating, supervising, supporting, and training counsel assigned as juvenile appellate defenders pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D shall comply with these standards as well as the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, CPCS will apply these standards, the Massachusetts Rules of Professional Conduct, and all CPCS policies and procedures in effect during the relevant time period.

Generally, there are three types of assignments that YAD Appeals will make to juvenile appellate defenders: direct appeals, screenings, and collateral litigation. These performance standards will address the requirements for assigned counsel in each of these assignments.

### **1. GENERAL PRINCIPLES APPLICABLE TO ALL JUVENILE APPELLATE AND POST-TRIAL MATTERS**

- a. The role of a juvenile appellate defender is to diligently and zealously represent the client's substantive and procedural rights and interests through the appellate or post-adjudication process on all matters within the scope of counsel's assignment. To ensure this level of zealous advocacy, counsel shall, at a minimum:
  1. Give the client counsel's undivided loyalty, free of all conflicts of interest;
  2. Maintain the confidentiality of all client communications;
  3. Elicit the client's preferences in a developmentally appropriate manner, advise the client, and provide guidance;
  4. Remain unaffected by the client's indigent status, age, background, or the nature of the offense;
  5. Recognize clients are subjected to discrimination and oppression based on race, sex, religion/creed, national origin, ancestry, disability, age, sexual orientation, gender identity, immigration status, socioeconomic status, and English language proficiency, and be mindful of bias and discrimination the client may have experienced;
  6. Be open, respectful, and understanding of the client's lived experiences;
  7. Determine the client's immigration status; if applicable, consult with CPCS's Immigration Impact Unit; determine client's expressed needs and preferences, and proceed as appropriate;
  8. Determine whether the client has a claim of factual innocence or need for forensic testing; if applicable, consult with CPCS's Innocence Program; determine client's expressed needs and preferences, and proceed as appropriate;
  9. If the client is under 22 years of age, determine the client's educational status and consult with CPCS's EdLaw Project; determine client's expressed needs and preferences, and proceed as appropriate.

10. Obtain the trial file, including attorney work product and case running log, if available, and any other extant records critical to evaluation of the client's case;
  11. Be thoroughly knowledgeable of relevant statutes, regulations and decisional law, including but not limited to:
    - a. G.L. c. 119, particularly Sections 53-84;
    - b. G.L. c. 120 (Department of Youth Services) (DYS) and the regulations governing DYS and its classification process contained in 109 C.M.R. 4.00 et seq;
    - c. G.L. c. 124-127 (Department of Correction) (DOC) and the regulations governing DOC contained in 103 C.M.R. 1.00 et seq;
    - d. G.L. c. 120 (Parole Board) and the regulations governing parole contained in 120 C.M.R. 1.00 et seq; and
    - e. Federal, state, and local education law and policies, including the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et. seq.; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C § 794; M.G.L. c. 71B, §§ 1–16; and 603 CMR 28.00.
  12. Be thoroughly knowledgeable of:
    - a. The scientific studies and decisional case law in Massachusetts as well as the U.S. Supreme Court addressing the legal ramifications of adolescent development;
    - b. The various service delivery systems in Massachusetts, including but not limited to: the Department of Children and Families (DCF), the Department of Mental Health (DMH) and the Department of Developmental Services (DDS); particularly where multi-system youth are concerned;
    - c. The interplay between the delinquency/youthful offender system and the child welfare system; and
    - d. The current CPCS Performance Standards for ongoing DYS representation.
- b. The juvenile appellate defender shall comply with all court rules and standing orders, including, but not limited to: the rules of criminal procedure, the rules of appellate procedure, Juvenile Court standing orders, the rules and standing orders of the Massachusetts Supreme Judicial Court (“SJC”), and the rules and standing orders of the Massachusetts Appeals Court, particularly the Appeals Court rules regarding dismissal of cases for lack of prosecution.
  - c. The juvenile appellate defender shall keep up to date on technological developments related to virtual hearings. The juvenile appellate defender shall be familiar with the requirements of the e-filing system utilized by the courts and shall efile documents in accordance with the courts’ requirements.
  - d. The juvenile appellate defender shall identify and consult with any other legal counsel currently representing the client, including but not limited to: trial counsel, DYS

counsel, SORB/SDP counsel, CAFL counsel, Mental Health counsel, and/or Parole counsel. The juvenile appellate defender shall, with the client's permission, collaborate with all legal counsel to provide holistic and client-centered representation.

- e. In order to adequately represent the juvenile or former juvenile client, the juvenile appellate defender shall have a thorough understanding of adolescent development, positive youth development, and the effects of trauma. In particular, the juvenile appellate defender shall:
  - 1. Develop a trauma-responsive relationship with the client; and
  - 2. Communicate with an adolescent or young adult client in a developmentally appropriate manner, employing a positive youth development approach.
  
- f. The juvenile appellate defender shall use the litigation process to support adolescent or young adult clients in focusing on the adolescent client's strengths and shall encourage the client to have a voice in the proceedings. Examples of how counsel can implement this standard are:
  - 1. Ensure the client always feels safe;
  - 2. Maintain a neutral posture and expression;
  - 3. Ask open-ended questions whenever possible;
  - 4. Encourage the client to speak, but also allow silence in one-on-one meetings to give the client time to internalize information;
  - 5. Listen actively and carefully;
  - 6. Ask the client to repeat back what you have discussed in order to gauge their level of understanding;
  - 7. Encourage conversations outside the details of the case to discover the client's goals and dreams, and follow up during subsequent meetings regarding these goals and dreams;
  - 8. Assist the client in finding solutions and making realistic plans regarding their future; and
  - 9. Consider seeking funds to hire or consult a social service provider to assist the client with future goals and planning.
  
- g. In all communications with the client the juvenile appellate defender shall:
  - 1. Have contact with the client at least every eight weeks, unless otherwise specified below, utilizing whenever possible the client's preferred method of communication;
  - 2. Employ a developmentally appropriate approach to written and oral client communication with the goal of assisting the client to have the maximum engagement in and understanding of the post-adjudication litigation;
  - 3. Accept and respond to all client communications in a timely and confidential manner;
  - 4. Advise the client and parent/guardian, where the client remains a minor, that the juvenile is the client, not the parent/guardian, and, as such, all communications

with the client in a one-on-one setting are privileged and counsel cannot break this privilege without client authorization;

5. Completely inform both the client and, where the client remains a minor, the parent/guardian, about counsel's role, particularly clarifying the lawyer's obligation to advocate for the client regardless of the parent/guardian's perspective;
  6. Advise the client and the parent/guardian, where the client remains a minor, that counsel cannot waive any substantial right or substitute counsel's own view or the parent/guardian's view for that of the client;
  7. Promptly provide the client with information and consult with the client concerning all developments in the case; and
  8. Promptly provide the client copies of all communications to the client, documents filed on the client's behalf, and documents filed by the Commonwealth in opposition to the client's position. If the client is incarcerated or committed, counsel shall inquire whether the client would like to receive a copy of each document before providing it, in order to prevent any unintended exposure of material to other inmates or facility personnel. In this instance, counsel shall review the document with the client and make a copy available to the client upon request.
- h. If the juvenile appellate defender reasonably believes that, due to a mental, emotional, or cognitive impairment or other disability, informing the child client of all significant developments in the case would adversely affect the child client, the juvenile appellate defender shall:
1. Comply in all respects with the applicable Massachusetts Rules of Professional Conduct, including but not limited to Rule 1.14;
  2. Consult with the Director or designee;
  3. Document any variance from the performance standards, as well as efforts to communicate with the client, including attempts to reduce barriers to effective communication;
  4. Reassess the situation periodically, at least every three months; and
  5. Maintain contact with the client's parent, guardian or other interested adult designated by the child.
- i. If the child client's capacity to make adequately considered decisions is diminished, the juvenile appellate defender shall:
1. Comply in all respects with the applicable Massachusetts Rules of Professional Conduct, including but not limited to Rule 1.14;
  2. Consult with the Director or designee;
  3. Reassess the situation periodically, at least every three months; and
  4. Maintain contact with the client's parent, guardian or other interested adult designated by the child.
- j. If required to work with a mentor, the juvenile appellate defender shall comply with all YAD Appeals mentoring program requirements.

## **2. PRINCIPLES APPLICABLE TO DIRECT APPEALS**

These standards apply to assignments for a direct appeal after either a trial, a conditional plea pursuant to Mass. R. Crim. P. 12(b)(6), or an allowed interlocutory appeal. Juvenile appellate defenders shall comply with all the general principles outlined in Part 4.E.1 of these performance standards. In addition, in a direct appeal, the juvenile appellate defender shall comply with the following.

- a. Within five business days of the assignment:
  1. File an appearance in the trial court, and, if the appeal has already entered, in the Appeals Court, and serve the appearance on all counsel of record;
  2. Confirm the notice of appeal was timely filed;
  3. Confirm transcripts of all relevant hearings have been ordered in accordance with the procedural requirements of Trial Court Administrative Order 19-1: Transcription procedures for appellate review;
  4. Notify the client in writing of the assignment and a reliable way to regularly communicate; and
  5. Contact trial counsel to request the trial file and consult regarding the client, proceedings below, and potential appellate issues. If necessary, document repeated attempts to communicate with trial counsel.
  
- b. Within ten business days of the assignment:
  1. Meet in person or via video chat (according to the client's preference) with the client to explain counsel's role, discuss the appellate process, and begin to engage the client in a conversation using the model set forth in Section 4.E.1.g-h of these standards. If the client remains in the community, counsel shall arrange to meet the client at a private and safe location convenient to the client and any parent/guardian.
  2. Counsel shall, except in extraordinary circumstances, meet with the client alone to maintain the attorney-client relationship and ascertain the client's wishes with respect to parent involvement. If extraordinary circumstances exist such that meeting alone with the juvenile client is not possible or ill-advised, counsel shall confer with the Director or designee and develop a client-specific course of action.
  3. Where the client remains a juvenile, it is advisable to meet with the parent/guardian immediately after the client meeting and explain counsel's role, the appellate process, and the bounds of confidentiality.
  
- c. Within 20 business days after receipt of the transcript, counsel shall have reviewed the entire transcript of the case and shall:

1. Determine whether there is a need for reconstruction of the record and, if so, comply with the procedures outlined in Mass. R. App. P. 8;
  2. Determine whether there is a need to order additional hearing dates to be transcribed and, if so, comply with the procedural requirements of Trial Court Administrative Order 19-1: Transcription procedures for appellate review; and
  3. Meet in person or via video chat (according to the client's preference) with the client to discuss the issues the client wants raised in the direct appeal and the next steps in the appellate process. Such meetings shall follow the standards set forth in Section 4.E.1.g-h.
- d. The juvenile appellate defender shall promptly take all measures necessary to cure any unreasonable delay in the production and assembly of the record on appeal, particularly the production of recordings and transcripts of the trial court proceedings. Such measures may include contacting the clerk, court reporter, or other court personnel and, if necessary, seeking a court order to cure any unreasonable delay.
- e. If, at any time, it appears to the juvenile appellate defender that, in light of the standards set forth in Commonwealth v. Hodge (No. 1), 380 Mass. 851, 855 (1980), there is a reasonable possibility that an incarcerated client, or client confined at DYS for secure treatment, might receive a stay of sentence pursuant to Mass. R. Crim. P. 31 or Mass. R. Crim. App. P. 6, the juvenile appellate defender immediately shall bring in the appropriate court a motion to stay the client's sentence.
- f. In youthful offender cases, representing clients before the Appellate Division of the Superior Court in a sentencing appeal is generally the responsibility of trial counsel. However, if the juvenile appellate defender learns that trial counsel is unavailable and the client wishes to pursue a sentencing appeal, the juvenile appellate defender shall notify the Director or designee, who may authorize the juvenile appellate defender to represent the client in the sentencing appeal.
- g. The juvenile appellate defender shall consider whether the client would be best served by the filing of a motion for a new trial pursuant to Mass. R. Crim. P. 30 prior to litigating the direct appeal. In cases in which factual development or expertise is required to make this determination, the juvenile appellate defender shall seek funds for an investigator or relevant expert. In addition, the client's family, friends, and community members are valuable partners in gathering evidence and offering community expertise on topics like community police practices and the lasting impact of trauma. If a client explicitly and specifically permits it, the juvenile appellate defender may share some case information with a person or group of people designated by the client, as long as the juvenile appellate defender does not disclose confidential information or void attorney-client privilege.
- h. If the juvenile appellate defender determines that a Rule 30 motion should be litigated, the juvenile appellate defender shall seek the approval of the Director or designee and,

if approved, shall file a Rule 30 motion in the trial court. If the appeal has already been docketed, the juvenile appellate defender shall seek leave of the single justice to file a Rule 30 motion in the trial court and shall file a motion to stay the appeal. Counsel shall send an electronic copy of the motion to the Director.

- i. In all appeals, the juvenile appellate defender shall evaluate whether an application for direct appellate review (DAR) is warranted. If counsel determines that such an application is meritorious, counsel should consult with the Director or designee before filing such application and shall explain to the client the grounds for the application and any likely delay in the appeal. If an application for DAR is granted, counsel shall:
  1. Comply with all requirements for filing of briefs in the SJC;
  2. Provide the client a copy of the application and brief filed in the SJC, consistent with the standards set out in 4.E.1.g(8);
  3. Immediately notify the Director of the grant of DAR; and
  4. Provide an electronic copy of the SJC brief to the Director at [yadappeals@publiccounsel.net](mailto:yadappeals@publiccounsel.net).
- j. In conformance with the Rules of Appellate Procedure, upon notice that the case has been docketed in the Appeals Court, the juvenile appellate defender shall E-file a criminal docketing statement.
- k. The juvenile appellate defender shall file timely, in the appropriate court, all motions necessary or advisable to preserve and perfect the client's appellate rights, including where necessary, motions to stay proceedings or stay the imposition of a judgment, motions in accordance with Mass. R. App. P. 14(b) to enlarge the time for filing a brief, and motions in accordance with Mass. R. App. P. 8 to correct or expand the record. Counsel shall notify the client of each such motion and the ruling.
- l. The juvenile appellate defender shall promptly and appropriately respond to any notice from the Appeals Court pursuant to M.A.C. Rule 19. Counsel shall promptly inform the Director of the receipt of and response to any such notice.
- m. Before filing the brief, counsel shall meet in person or via video chat (according to the client's preference) with the client, to discuss the arguments and provide the client an opportunity to have a voice in the proceedings.
- n. Any brief filed by the juvenile appellate defender shall be of high quality, thoroughly researched, and well written, and shall conform in all respects with the Rules of Appellate Procedure, particularly Rules 16, 18 and 20.
- o. In developing the arguments for the brief, in any case in which the juvenile faces incarceration, probation and/or parole, counsel shall consider whether there are federal constitutional claims which could, in the event relief is denied in the state appellate courts, form the basis for a successful petition for a writ of habeas corpus in federal

district court. If so, counsel shall raise and argue such claims in a manner sufficient to preserve and exhaust such claims for federal habeas review.

- p. The juvenile appellate defender shall pursue all meritorious issues for appeal unless they determine there are strategic reasons for not doing so, and the client agrees with counsel's decision. If at any time the client insists that the juvenile appellate defender brief a contention that, in the judgment of the juvenile appellate defender, cannot be supported by any rational argument, counsel shall (a) immediately inform and consult with the Director or designee; (b) inform the client of the client's rights with respect to such contention pursuant to Commonwealth v. Moffett, 383 Mass. 201, 203-209 (1981); (c) supply the client with a copy of the Moffett opinion (consistent with the standards set out in 4.E.1.g(8)); and (d) if the client thereafter wishes to invoke their Moffett rights with respect to such contention, comply in all respects with the guidelines of the Moffett case set forth id. at 208-209 and n. 3.
- q. Because there is not a right to oral argument in every criminal appeal, counsel shall file a reply brief when necessary to respond to any portion of the Commonwealth's brief that either: (1) raises significant new issues not discussed in the juvenile appellant's brief; (2) materially misrepresents the facts or the law; or (3) materially misrepresents the issues or arguments raised in the appellant's brief.
- r. The juvenile appellate defender shall, upon filing the brief, provide the client a copy of the brief in person, by mail, or electronically (consistent with the standards set out in 4.E.1.g(8)), and shall provide an electronic copy of all briefs to the Director.
- s. Within five business days of receipt of the notice of oral argument date, counsel shall notify the Director of the scheduled date of oral argument.
- t. The juvenile appellate defender shall not waive oral argument. Counsel shall meet in person or via video chat (according to the client's preference) with the client within ten business days of receipt of the notice of oral argument date. Counsel shall inform the client and any parent/guardian of the date, time, and place of the oral argument, and of the client's right to attend (if not incarcerated or committed), to allow the client to arrange transportation to the argument. If the client is unable to attend the oral argument, counsel shall offer to meet with the client to view the recording or provide the client with access to a recording of the argument.
- u. Within five business days of receiving a decision, the juvenile appellate defender shall email the decision to the Director and meet with the client in person or via video chat (according to the client's preference). Counsel shall provide a copy of the decision to the client, consistent with the standards set out in 4.E.1.g(8).
- v. If the decision in the Appeals Court is unfavorable to the client in whole or in part, within three business days, the juvenile appellate defender shall inform the client of the right to seek further appellate review (FAR) in accordance with Mass. R. App. P. 27.1. After consulting with the client, the juvenile appellate defender shall file an application

for FAR within the time frame outlined in Rule 27.1, unless directed otherwise by the client. If counsel is unable to timely consult with the client or the client takes no position on seeking FAR, counsel shall file the application. Counsel shall notify the client in writing within two business days of the SJC's order on the application for FAR.

- w. If an application for FAR is granted, the juvenile appellate defender shall:
  - 1. Comply with all requirements for filing of briefs in the SJC;
  - 2. Provide the client a copy of the application and brief filed in the SJC, consistent with the standards set out in 4.E.1.g(8);
  - 3. Immediately notify the Director of the grant of FAR; and
  - 4. Provide an electronic copy of the SJC brief to the Director at [yadappeals@publiccounsel.net](mailto:yadappeals@publiccounsel.net).
  
- x. If the SJC issues an amicus announcement in the client's case, the juvenile appellate defender shall immediately notify the Director.
  
- y. In the event the client's appeal is unsuccessful, the juvenile appellate defender shall meet with the client in person or via video chat (according to the client's preference) before closing the case. Before that meeting, counsel shall:
  - 1. Inform the client of the opportunity to file within 60 days a motion to revise and revoke sentence pursuant to Mass. R. Crim. P. 29 and, unless the client directs counsel not to, timely file a motion so as to preserve the client's rights under Mass. R. Crim. P. 29; and
  - 2. In appropriate cases, consult with the Director regarding seeking relief from the client's adjudication by petition for writ of certiorari to the United States Supreme Court or federal habeas corpus relief, upon the request of the client and subject to the approval of the Director.
    - a. In determining whether to approve counsel petitioning for habeas or certiorari, the standard YAD applies is whether the client would benefit from the assignment of counsel to litigate the petition.
    - b. Before requesting approval to petition for habeas or certiorari, the juvenile appellate defender should determine, in their best judgment, that there exists a reasonable likelihood such relief may be obtained.
      - i. In order to determine whether there is a reasonable likelihood of federal relief, counsel shall confirm that the client's case meets the relevant thresholds.
        - 1. For habeas relief, the client must be "in custody" and the federal constitutional claims must have been "exhausted." In addition, federal habeas relief requires a state court ruling that was contrary to or has either gone against a clear constitutional rule announced by the United States Supreme Court or involved an unreasonable

determination of the facts based on the evidence developed in the state court proceedings.

2. Certiorari relief requires a showing that the SJC has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals, or has decided an important question of federal law that has not been, but should be, settled by the Supreme Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court.
  - ii. Counsel must be a member of the federal District Court for the District of Massachusetts bar to file a petition for habeas. If YAD approves counsel to file a petition for habeas, counsel must file a motion in federal court to appoint counsel under the Criminal Justice Act (“CJA”). If the federal district court allows the motion, counsel must withdraw from the federal case.
  - iii. If counsel will not be continuing representation, for any reason, counsel shall explain to the client the statute of limitations for the filing of a petition for habeas in federal district court and the need to exhaust any federal constitutional issues for federal habeas review.
  - iv. Counsel does not need to be a member of the United States Supreme Court bar to file a petition for certiorari. If YAD approves counsel to file a petition for certiorari, counsel must file a motion for leave to proceed *in forma pauperis* in the Supreme Court. If certiorari is granted, counsel must either become a member of the Supreme Court bar or be granted leave to argue *pro hac vice*. Otherwise, YAD will appoint successor counsel to brief and argue the merits case.
  - v. If counsel will not be continuing representation, for any reason, counsel shall explain to the client the statute of limitations for the filing of a petition for certiorari.

### **3. PRINCIPLES APPLICABLE TO JUVENILE MURDER APPEALS**

These standards apply to assignments for a direct appeal from a conviction for first degree murder. Juvenile appellate defenders shall comply with all the general principles outlined in Part 1 of these performance standards. In addition, the juvenile appellate defender shall comply with the following.

- a. The juvenile appellate defender shall be familiar with the Supreme Judicial Court’s Order Governing Appeals from Convictions of Murder in the First Degree and G.L. c. 278, § 33E.
- b. Within five business days of the assignment:

1. File an appearance in the trial court and serve the appearance on all counsel of record;
  2. Confirm the notice of appeal was timely filed;
  3. Confirm transcripts of all relevant hearings have been ordered in accordance with the procedural requirements of Trial Court Administrative Order 19-1: Transcription procedures for appellate review;
  4. Notify the client in writing of the assignment and a reliable way to regularly communicate; and
  5. Contact trial counsel to request the trial file and consult regarding the client, proceedings below, and potential appellate issues. If necessary, document repeated attempts to communicate with trial counsel.
- c. Within ten business days of the assignment:
1. Meet in person or via video chat (according to the client's preference) with the client to explain counsel's role, and begin to engage the client in a conversation using the model set forth in Section 4.E.1.g-h of these standards regarding G.L. c. 278, § 33E review. Where the client remains a juvenile, ascertain the client's wishes with respect to parent involvement.
- d. Within eight weeks of receipt of the transcript, counsel shall have reviewed the entire transcript of the case and shall:
1. Determine whether there is a need for reconstruction of the record and, if so, comply with the procedures outlined in Mass. R. App. P. 8;
  2. Determine whether there is a need to order additional hearing dates to be transcribed and, if so, comply with the procedural requirements of Trial Court Administrative Order 19-1: Transcription procedures for appellate review; and
  3. Meet in person or via video chat (according to the client's preference) with the client to discuss the issues the client wants raised and the next steps in the appellate process. Such meetings shall follow the standards set forth in Section 4.E.1.g-h.
- e. The juvenile appellate defender shall promptly take all measures necessary to cure any unreasonable delay in the production and assembly of the record on appeal, particularly the production of recordings and transcripts of the trial court proceedings. Such measures may include contacting the clerk, court reporter, or other court personnel and, if necessary, seeking a court order to cure any unreasonable delay.
- f. If, at any time, it appears to the juvenile appellate defender that, in light of the standards set forth in Commonwealth v. Hodge (No. 1), 380 Mass. 851, 855 (1980), there is a reasonable possibility that the client might receive a stay of sentence pursuant to Mass. R. Crim. P. 31 or Mass. R. Crim. App. P. 6, the juvenile appellate defender immediately shall bring in the appropriate court a motion to stay the client's sentence.

- g. The juvenile appellate defender shall file timely, in the appropriate court, all motions necessary or advisable to preserve and perfect the client's appellate rights, including where necessary, motions to stay proceedings or stay the imposition of a judgment, motions in accordance with Mass. R. App. P. 14(b) to enlarge the time for filing a brief, and motions in accordance with Mass. R. App. P. 8 to correct or expand the record. Counsel shall notify the client of each such motion and the ruling.
- h. Absent exceptional circumstances, in a first-degree murder appeal, the juvenile appellate defender shall file a motion for a new trial pursuant to Mass. R. Crim. P. 30 during the pendency of the direct appeal. In investigating the basis for the Rule 30 motion, the juvenile appellate defender may share information with a person or group as described in section 4.E.2.g, above. If the juvenile appellate defender determines exceptional circumstances exist, counsel shall notify and consult with the Director. Counsel shall provide an electronic copy of any Rule 30 motion filed to the Director. In addition to raising any legal claims such as ineffective assistance of counsel or newly discovered evidence, the new trial motion and appendix shall contain any additional information, reports, or juvenile records that could support a claim for relief under G.L. c. 278, § 33E if the new trial motion is denied and a consolidated direct appeal proceeds in the SJC.
- i. If the SJC issues an amicus announcement in the client's case, the juvenile appellate defender shall immediately notify the Director.
- j. Before filing the brief, counsel shall meet in person or via video chat (according to the client's preference) with the client, to discuss the arguments and provide the client an opportunity to have a voice in the proceedings.
- k. Any brief filed by the juvenile appellate defender shall be of high quality, thoroughly researched, and well written, and shall conform in all respects with the Rules of Appellate Procedure, particularly Rules 16, 18 and 20.
  - 1. Unless there are tactical reasons for not doing so and the client agrees with counsel's decision, counsel shall specifically argue for relief under G.L. c. 278, § 33E.
  - 2. Counsel shall also consider whether there are federal constitutional claims which could, in the event relief is denied in the state appellate courts, form the basis for a successful petition for a writ of habeas corpus in federal district court. If so, counsel shall raise and argue such claims in a manner sufficient to preserve and exhaust such claims for federal habeas review.
  - 3. Absent exceptional circumstances, counsel shall file a reply brief.
- l. The juvenile appellate defender shall pursue all meritorious issues for appeal unless they determine there are strategic reasons for not doing so, and the client agrees with counsel's decision. If at any time the client insists that the juvenile appellate defender

brief a contention that, in the judgment of the juvenile appellate defender, cannot be supported by any rational argument, counsel shall (a) immediately inform and consult with the Director; (b) inform the client of the client's rights with respect to such contention pursuant to Commonwealth v. Moffett, 383 Mass. 201, 203-209 (1981); (c) supply the client with a copy of the Moffett opinion (consistent with the standards set out in 4.E.1.g(8)); and (d) if the client thereafter wishes to invoke their Moffett rights with respect to such contention, comply in all respects with the guidelines of the Moffett case set forth id. at 208-209 and n. 3.

- m. The juvenile appellate defender shall, upon filing the brief, provide the client a copy of the brief in person, by mail, or electronically (consistent with the standards set out in 4.E.1.g(8)), and shall provide an electronic copy of all briefs to the Director.
- n. Within five business days of receipt of the notice of oral argument date, counsel shall notify the Director of the scheduled date of oral argument.
- o. Within ten business days of receipt of the notice of oral argument date, counsel shall meet in person or via video chat (according to the client's preference) with the client. Counsel shall inform the client and any parent/guardian of the date, time, and place of the oral argument. Counsel shall offer to meet with the client to view the recording of the argument or provide the client access to a recording of the argument.
- p. Within five business days of receiving a decision, the juvenile appellate defender shall email the decision to the Director and meet with the client in person or via video chat (according to the client's preference). Counsel shall provide a copy of the decision to the client, consistent with the standards set out in 4.E.1.g(8).
- q. In the event the client's appeal is unsuccessful, the juvenile appellate defender shall meet with the client in person as soon as practicable before closing the case. Before that meeting, counsel shall:
  - 1. Consult with the Director regarding the client's initial parole eligibility date and coaching the client regarding future parole eligibility; and
  - 2. In appropriate cases, consult with the Director regarding seeking relief from the client's conviction by petition for writ of certiorari to the United States Supreme Court or federal habeas corpus relief, upon the request of the client and subject to the approval of the Director, consistent with the standards set out in 4.E.2.y(2).

#### **4. PRINCIPLES APPLICABLE TO SCREENING CASES AND COLLATERAL LITIGATION**

##### **A. Duties of Screening Counsel**

Due to the evolving nature of juvenile law and practice, counsel is often needed for the purpose of conducting an investigation to determine whether the client would benefit from the

assignment of counsel to pursue a collateral attack of their adjudication, conviction, or sentence. However, there is no right to counsel in this context. Instead, this is a limited assignment as “screening counsel” and counsel’s primary duty is to investigate the factual and legal claims. As such, where appropriate, screening counsel shall advise the client that counsel may not make any claim that, in the opinion of counsel, is frivolous or fails to meet the standard that the client would benefit from the assignment of counsel.

Screening counsel shall comply with the principles outlined in Part 1 of these performance standards. In addition, screening counsel shall comply with the following.

1. Within seven business days of assignment, screening counsel shall communicate with the client regarding:
  - a. The screening assignment and its limitations, in particular that at this stage, counsel’s role is a factual and legal investigator and counsel has not been appointed to file motions or represent the client in court;
  - b. The steps that screening counsel will be taking on the client’s behalf; and
  - c. The timeframe for conclusion of the screening.
2. Screening counsel shall follow the guidelines for client communication set forth in Part 4.E.1.g-h.
3. Unless the circumstances of the assignment require immediate action, within 30 days of assignment, counsel shall meet with the client in person to obtain a history of the case, the client’s personal history, and any other details necessary to thoroughly investigate the screening assignment.
4. Generally, screening counsel shall not file an appearance unless it is necessary to complete the investigation. In that instance, a “limited appearance” as “screening counsel” may be entered for the purpose of investigation. Before entering any limited appearance, counsel shall review Commonwealth v. Francis, 485 Mass. 86 (2020), and the YAD Practice Advisory regarding the Francis decision to ensure that any future claims of waiver are avoided or minimized.
5. The screening process shall include a factual and legal investigation focused on juvenile-specific issues to determine whether the juvenile would benefit from the assignment of counsel. To properly investigate a screening case, counsel shall:
  - a. Referring to the Juvenile Appeals screening checklist, obtain and review all available documents, transcripts, motions, or other items related to the issues raised by the client or identified by screening counsel;
  - b. Where appropriate, obtain and review educational and DYS records;
  - c. Where appropriate, speak with any additional parties authorized by the client, such as a parent, trial counsel, retained expert, or other individual;
  - d. Consult with the client on at least one occasion in a confidential setting during the investigation;

- e. Begin with the assumption that all issues raised by the client are meritorious. Inquire as to whether the client wishes the attorney to investigate any particular issues, including whether the client misunderstood or was misinformed about any of their rights, the disposition imposed, or any collateral consequences of the disposition;
  - f. Consider whether the case contains meritorious issues not previously presented to a court even if not specifically raised by the client;
  - g. Consider whether a miscarriage of justice may have occurred;
  - h. Consider new areas of factual investigation and expertise;
  - i. Evaluate any potential claims of ineffective assistance of trial or prior appellate counsel;
  - j. Assess the legality of any sentence at the time it was imposed;
  - k. Determine whether there have been any changes in jurisprudence or sentencing laws, or other changes to sentencing practices, that may benefit the client. Such claims may involve resentencing, relief from SORB registration, or other collateral consequences;
  - l. Determine whether there were any errors in the imposition of the sentence or on the client's official Criminal Offender Record Information (CORI). Counsel can only ensure that no such errors have occurred by obtaining a copy of the client's CORI. Therefore, in all screening cases, counsel shall:
    - a. Obtain from the client an authorization to access the client's CORI through the Commissioner of Probation's office;
    - b. Have the client complete the Affidavit of Indigency form to seek a waiver of the CORI request fee; and
    - c. Obtain the client's official CORI from the Criminal History Systems Board;
  - m. Determine whether the client would benefit from sealing or expunging certain offenses;
  - n. Advise the client of the potential benefits and, if applicable, the potential risks of any collateral attacks or other post-trial litigation; and
  - o. Share counsel's preliminary conclusions with respect to the risks and benefits of any collateral litigation with the client. Counsel shall take client's receptivity to counsel's preliminary conclusions into account when making a final recommendation.
6. In cases in which factual development or expertise is reasonably required to pursue filing of a motion pursuant to Mass. R. Crim. P. 30, the juvenile appellate defender shall seek funds for an investigator or relevant expert pursuant to Mass. R. Crim. P. 30(c)(5).
  7. In conducting a factual investigation under this section, the juvenile appellate defender may share information with a person or group as described in section 4.E.2.g, above.
  8. Within 120 days of assignment, counsel shall provide the Director or designee a thorough and detailed written screening report. Counsel may request additional time for

the report from the Director. Requests for reasonable extensions will typically be granted. The screening report shall include a completed Juvenile Appeals screening checklist, including, where applicable:

- a. A factual summary of the case against the client;
  - b. A summary of the procedural history of the case, including each charge and disposition;
  - c. The theory of defense at trial;
  - d. A description of the pretrial investigation conducted by trial counsel;
  - e. A description of pretrial motions litigated and the outcome of those motions;
  - f. Issues raised on appeal and in other post-adjudication or post-conviction motions;
  - g. A summary of the client's personal history (age at adjudication or conviction, mental and physical health, immigration status, etc.);
  - h. For any documents on the Juvenile Appeals Screening Checklist that exist or existed but were not reviewed, an explanation as to why they were not reviewed;
  - i. A description of the issues the client asked counsel to investigate and counsel's legal analysis of these claims;
  - j. A description of all the steps completed during the factual investigation and, where appropriate, facts discovered that either support or refute the client's claim;
  - k. A comprehensive legal analysis of all claims investigated, including legal citations and a detailed explanation of the arguments in support of and in opposition to the claim;
  - l. A description of the client's receptivity to counsel's preliminary conclusions; and
  - m. Counsel's final recommendation regarding whether there is a reasonable likelihood the client would benefit from counsel in any post-adjudication or post-conviction proceeding.
9. Counsel shall, at the time the screening report is submitted, provide a copy of the screening report to the client, along with a letter stating the decision whether to assign counsel to pursue collateral litigation rests solely with YAD. The letter and screening report shall be communicated in a manner consistent with the standards set out in 4.E.1.g(8).
10. Upon receipt of screening counsel's report, the Director or designee will within 30 days either approve counsel's suggested course of action or decline approval of the case for further litigation. In no instance shall screening counsel file any collateral motion without the prior authorization of the Director or designee.
11. If the case is approved for litigation of collateral relief, screening counsel shall submit a final bill and close the screening NAC. A new NAC will be issued for any approved collateral litigation. It is expected that screening counsel will accept the appointment of counsel to represent the client for any collateral litigation.

## **B. Duties of Counsel During Collateral Litigation**

1. Within 15 days of filing a motion for collateral relief, counsel shall provide the client a copy of the motion and memorandum, consistent with the standards set out in 4.E.1.g(8), and shall simultaneously provide an electronic copy to the Director.
2. If a hearing is scheduled, and the client remains incarcerated or committed, counsel shall order and confirm that a habeas has issued to ensure that the client is present for all hearings. For any client not incarcerated or committed, counsel shall within seven business days notify the client of any hearing dates to allow sufficient time for the client to arrange transportation to the proceeding.
3. Within ten business days of any decision of the court, counsel shall notify the client in person or via video chat (according to the client's preference) and shall provide a copy of any such decision to the client, consistent with the standards set out in 4.E.1.g(8), and shall simultaneously provide an electronic copy to the Director.
4. If the decision on any collateral motion is unfavorable to the client, counsel shall timely file a notice of appeal, unless directed otherwise by the client. Simultaneously with the filing of the notice of appeal, counsel shall provide the notice to the Director. Except for circumstances where counsel believes they may have provided deficient representation, it is expected that counsel shall accept assignment as appellate counsel. Counsel shall promptly submit a final bill and close the collateral assignment NAC. A new NAC will be issued for the appeal. As appellate counsel, counsel shall comply with the procedures outlined in Parts 2 and 3 of these standards.
5. In the event a former screening client requests a subsequent screening on a different collateral issue, it is preferred that counsel accept the appointment for the subsequent screening, both for the continuity of representation for the client and in order to conserve limited resources. If a conflict arises, counsel should consult the Director regarding the assignment of different screening counsel.

# 5. Policies and Procedures Governing Billing and Compensation

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## **A. COMPENSATION**

The attorney shall not accept any compensation or other consideration for assigned representation except through the Committee for Public Counsel Services. This rule applies to both indigent cases and marginally indigent cases.

## **B. PUBLICATION OF POLICIES OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES**

All attorneys receiving case assignments through the Committee for Public Counsel Services must regularly review the CPCS website, [www.publiccounsel.net](http://www.publiccounsel.net), for updates of CPCS policies, procedures, and guidelines. New and revised policies are posted on the website continuously. Notice of new and revised policies and procedures are also posted periodically on E-Bill.

CPCS provides attorneys receiving case assignments with training materials, case notes, and other important legal updates through email and electronic notices. In addition, CPCS has resources available on the CPCS website, [www.publiccounsel.net](http://www.publiccounsel.net). Attorneys are expected to apprise themselves of all CPCS rules, policies, and training materials published in this Manual and on the CPCS website as well as the information contained in notices posted on E-Bill.

## **C. PROHIBITION FROM BEING PRIVATELY RETAINED ON THE PREVIOUSLY ASSIGNED CASE**

An attorney may not be privately retained in a case in which s/he was previously assigned. The purpose of this rule is to prevent the appearance of impropriety, conflict of interest, solicitation, or fraud upon the court.

### **1. Exceptions to this general rule are outlined below:**

#### **a. Non-Indigent Client - Bail-Only Assignment in Error**

If the client was originally found to be not indigent, but counsel was nevertheless in error assigned by the court at arraignment for bail purposes only, then the attorney may be privately retained by the client at the request of the client. In such cases, the attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client nevertheless wishes to retain the attorney privately on the case, the attorney shall obtain a written informed consent signed by the client stating the client's understanding of his or her right to seek

other counsel for the private case.

**b. Originally Indigent Client - Intervening Determination of Non-Indigency**

If the client was originally found indigent and the attorney was assigned by the court, but during the course of the representation, the court makes a subsequent determination that the client is not indigent, then the attorney may be privately retained by the client at that time, at the request of the client. In proceedings pursuant to G.L. c. 111, §§ 94C and 94G; c. 123; c. 123A; and c. 190B, where a subsequent determination that the client is not indigent is made prior to the commencement of a hearing, the attorney may be privately retained by the client at the client's request, unless the court directs the attorney to continue representing the client at public expense or, in proceedings under G.L. c. 190B, from the assets of the client or another party at a rate set by the court; and provided further, that where a subsequent determination that the client is not indigent is made after the commencement of a hearing, the attorney shall continue to represent the client at public expense or, in proceedings under G.L. c. 190B, from the assets of the client or another party at a rate set by the court. See also SJC Rule 3:10, § 5.

**c. Care & Protection Assignment Prior to Indigency Determination**

If a client in a Care & Protection case was assigned counsel upon filing of the petition before an indigency determination was made, and the court subsequently found the client to be not indigent and struck the appearance of counsel, then the attorney may be privately retained by the client, at their request.

In such cases, the attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client nevertheless wishes to retain the attorney privately on the case, the attorney shall obtain a written informed consent signed by the client stating the client's understanding of his or her right to seek other counsel for the private case.

2. The following matters are distinct from the underlying case and are not encompassed by the prohibition against being privately retained on a previously assigned case.

**a. Parole Hearings**

An attorney who was assigned to represent an indigent client on a criminal matter

that resulted in conviction and incarceration, may, at a later date, be privately retained to represent the client at a parole hearing.

**b. SORB Cases**

An attorney who was assigned to represent an indigent client on a criminal matter involving a sex offense that resulted in conviction, and which later gives rise to a separate Sex Offender Registry Board case, may, at a later date, be privately retained to represent the client in the subsequent SORB matter if the client is no longer indigent, and the underlying assigned criminal case has concluded.

**3. Erroneous assignment to cases not within the CPCS scope of services:**

An attorney who was erroneously assigned by the court to an indigent client on a case that is beyond the CPCS scope of services may be privately retained by the client to represent the client in that case. In such cases, the attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client nevertheless wishes to retain the attorney privately on the case, the attorney shall obtain a written informed consent from the client, stating the client's understanding of his or her right to seek other counsel for the private case.

**D. REPRESENTATION OF CPCS CLIENTS ON UNRELATED CASES**

After an attorney has been assigned to a client's Criminal, Juvenile Delinquency, Youthful Offender, Mental Health, Children and Family Law, SORB, SDP, or DYS Revocation of Grants of Conditional Liberty ("Revocation") case, if the client wishes to retain the attorney privately on a separate unrelated case, the attorney shall advise the client of his/her right to seek other counsel. The attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client continues to request to retain the attorney privately on the separate unrelated case, the attorney shall obtain a written informed consent from the client, stating the client's understanding of his/her right to seek other counsel for the private case. In CAFL cases there is an additional requirement for the informed consent. The client must state that the attorney advised him or her that DCF regulations required the attorney to agree not to give copies of the DCF file to anyone who was not a party to the assigned case. (See 110 CMR 12.09)

## **E. COLLATERAL REPRESENTATION**

Occasionally, during the course of representation on an assigned case, an issue may arise that involves a collateral matter. As a general rule, CPCS's scope of services does not extend to collateral matters. However in some situations, the collateral issue may be integral to, and have a direct bearing upon the pending assigned case. In such circumstances, where the legal outcome of the assigned case is directly related to, and dependent upon, the resolution of the "collateral" matter, counsel must first receive authorization from CPCS to handle the "collateral" matter in order to be paid for that portion of his or her work. Without specific authorization, counsel's representation on collateral matters must be pro bono.

### **1. Criminal, Juvenile Delinquency, Youthful Offender, Mental Health, SDP, and Revocation of GCL Cases**

While a Criminal, Juvenile Delinquency, Youthful Offender, Mental Health, SDP, or GCL case is open, if the attorney wishes to receive compensation for representing a client on a collateral matter (i.e., a related matter that is, based on the specific circumstances, actually integral to the pending assigned case), the attorney must seek permission from the appropriate Deputy Chief Counsel to provide such "collateral" representation under the same CPCS assignment. Such requests for permission to provide collateral representation should be made in writing to the appropriate Deputy Chief Counsel (or designee). The specific circumstances of the original assignment and the nature of the related or collateral matter should be described in the written request. If the attorney's request to provide collateral representation is approved, the attorney may then provide services, but s/he may not receive compensation from the client or any other source, other than CPCS, for representation on the related case.

NOTE: If a juvenile client is found delinquent and committed to DYS, counsel assigned to represent the juvenile in the delinquency case at the trial level shall continue to provide zealous representation for the initial case conference (or "staffing") at any classification proceedings and at any extension hearings. The trial attorney shall also continue to provide zealous representation in preparation for, and during the client's RRT hearing. The trial attorney should continue to bill for this work under the original Notice of Assignment of Counsel number.

Revocation Attorneys in GCL matters should refer to the [Performance Standards for the Revocation Advocacy Panel](#), found in [Chapter 4](#) of this Manual.

### **2. CAFL Cases**

While a CAFL case is open, if the attorney wishes to receive compensation for representing a client on a related case, the attorney should submit a request for collateral representation to the Deputy Chief Counsel, Children and Family Law Division. See “Collateral Representation” in the CAFL [Performance Standards](#) and click [here](#) to obtain the request form. If the attorney’s request to provide collateral representation is approved by the Deputy Chief Counsel (or designee), the attorney may then provide services, but s/he may not receive compensation from the client or any other source, other than CPCS, for representation on the related case. After conclusion of a CAFL case, an attorney may represent the client in a related matter ([see below](#)).

If the attorney’s request to provide collateral representation under paragraphs A or B, above, is not approved and the client wishes to retain the attorney on the collateral matter, the attorney must comply with the provisions of “[Representation of CPCS Clients on Unrelated Cases](#)” above.

## **F. CAFL POST-DISPOSITION RELATED MATTERS**

Upon the conclusion of a CAFL case and after the assigned attorney has closed the case, the attorney may, if the client so requests, be privately retained to represent the client on a related case. However the attorney shall advise the client of his/her right to seek other counsel. The attorney shall be aware that representation of the client on such matters may create the appearance of impropriety, solicitation or overreaching. The attorney shall obtain written informed consent from the client, indicating the client’s understanding of his/her right to seek other counsel and further indicating that the client understands that DCF regulations require the attorney to agree not to give copies of the DCF file to anyone who was not a party to the assigned counsel case. (See 110 CMR 12.09.) Examples of cases in which the attorney may be independently retained after closure of the CAFL case include enforcement of open adoption agreements, paternity or divorce proceedings, or special education proceedings.

## **G. NOTICES OF ASSIGNMENT OF COUNSEL**

### **1. General Information**

A Notice of Assignment of Counsel (NAC) is issued by the court or by CPCS directly for each case in which CPCS provides representation. (See [Chapter 1](#) “Scope of Services”.) If the court uses an electronic assignment system, the attorney will receive notice of the “D” NAC number from CPCS. In certain cases, a paper “C” NAC may be issued by a Bar Advocate Program in accordance with its contractual responsibilities. Each “C” NAC includes a number that is unique to that assignment. For “C” NACs, even if an attorney’s assignment information is

not yet on file, the attorney must submit E-Bills timely to avoid the statutory penalties for late bills. (See [Item L](#) below.)

An attorney will receive a NAC each time s/he is assigned to an indigent client for a legal matter within the scope of CPCS services. Attorneys should review each NAC for accuracy and completeness, and maintain a legible copy of the NAC in the case file.

If a case is transferred from one attorney to another, it is necessary for the court, CPCS, or Bar Advocate Program to issue a new NAC to the new attorney. If an attorney withdraws, it is the responsibility of the attorney to notify the court and CPCS, and, in criminal, juvenile delinquency, and youthful offender matters, the appropriate Bar Advocate Program of his/her withdrawal so that a new NAC may be issued to successor counsel. It is the responsibility of successor counsel to obtain a new NAC from the court or CPCS.

## **2. Revocation of GCL Cases**

For Revocation cases, attorneys must request and obtain sufficient blank NAC forms from the Revocation Advocacy Coordinator prior to receiving assignments.

Upon being assigned to a Revocation case, the attorney is required to fill out the NAC. The attorney must fill out the date of assignment, write "CPCS" under Name of Assigning Judge, provide the name of the person for whom counsel is assigned, check the box indicating this is a Juvenile case, write "GCL" under CPCS code, write "GCL" under Description, write "906-CPCS" under Court Division, check the box indicating that the attorney is Private Counsel, and completely fill in the attorney's BBO number, name, address, and telephone number in the corresponding box.

The NAC must be signed by an authorized party in order to be processed by CPCS. The attorney must retain a legible copy of the NAC (by making a photocopy of the first page, and/or by ensuring that the goldenrod copy is legible); the attorney must retain the goldenrod copy (last sheet of the NAC) for his/her client file, and mail the rest of the completed NAC to the Revocation Coordinator at the following address:

Revocation Advocacy Coordinator  
Youth Advocacy Division  
75 Federal Street  
Boston, MA 02110

Attorneys uncertain of which address to use should call CPCS at (617) 482-6212 to

determine the current YAD address at any time.

Attorneys are advised to send their completed NACs to the Revocation Advocacy Coordinator as soon as possible after the assignment date, to prevent processing delays in these time-sensitive cases.

The Revocation Advocacy Coordinator will sign and authorize the NAC and send the white copy to the Accounts Payable Department for processing so that the attorney may be compensated.

If the case is transferred from one attorney to another, the new attorney must fill out and submit a new NAC to the Revocation Advocacy Coordinator, as above.

It is the responsibility of the attorney to contact the Revocation Advocacy Coordinator to send the attorney more blank NAC forms when his/her supply of NAC Forms is low. The attorney should not wait until s/he depletes her or his NAC supply before contacting the Revocation Advocacy Coordinator, as it will take some days for the Coordinator to mail NACs to the attorney.

## **H. BECOMING A STATE VENDOR – INSTRUCTIONS AND FORMS**

Attorneys must have a state Vendor Customer (VC) number and a Taxpayer Identification Number (TIN) on file with the State Comptroller's office before assignments and bills can be processed.

A "TIN" is the attorney's Social Security number or, if the attorney works for and is paid by a firm, the firm's Federal Tax ID number. A 1099 for income earned will be issued under this number. The attorney's 1099 will reflect the name and address the attorney lists as his/her legal name and address on the W-9 form (see below).

Notice: If the attorney's taxes are filed under a name and/or address that differs from his/her TIN name and address, the IRS will issue a "B" notice requesting an explanation for the apparent discrepancy. Failure to respond to a "B" notice will result in an IRS suspension of payments from the state.

To obtain an attorney vendor customer number, forms 1-5 (below) must be completed in the CPCS Vendor Portal. Please visit the CPCS Vendor Portal (<https://vendorportal.publiccounsel.net/>) to start and submit an application.

### **1. Request for Verification of Taxation Reporting Information (required):**

2. **Private Attorney Ebill 2.0 Access Agreement** (required)

3. **Attorney Certification Information** (required):

Upon receipt of the correctly completed forms, CPCS Accounts Payable Department will forward the attorneys' vendor information to the State Comptroller. Once the Comptroller approves the attorney's request for a vendor code, s/he will be assigned a VC number by the Comptroller. Upon receipt of this information, CPCS Accounts Payable Department will notify the attorney. This process takes approximately four (4) weeks.

4. **Electronic Funds Transfer (Direct Deposit)** (required):

The State Comptroller requires that all payment for services be made via direct deposit.

5. **New Attorney Professional Liability Form** (required):

All attorneys returning to CPCS service and new attorneys beginning CPCS service are required to provide proof that he or she maintains professional liability insurance. See [c. 2, § J](#).

6. **Mass Finance/Vendor Web - Payment History**

Mass Finance is a Commonwealth of Massachusetts web site. Vendor Web is the application through which vendors may view their payment transactions with the Commonwealth of Massachusetts. By accessing Scheduled Payments (information on payments that will be made) and Payment History (information on payments that have been made), attorneys and other vendors can reconcile their accounts. This information is available for viewing, printing or downloading 24 hours a day.

Attorneys may track their payments on E-Bill and by using the link below <https://massfinance.state.ma.us/>.

7. **E-Bill**

All attorneys' bills, both for legal services and expenses, must be submitted using the CPCS E-Bill program. Attorneys can access the website from any computer with an internet connection. The web address is: <https://ebill.publiccounsel.net>.

The E-Bill user manual is available by clicking [here](#).

## **I. COURT COSTS VENDOR RECORD KEEPING REQUIREMENTS**

All vendors paid by CPCS with Indigent Court Cost Act (ICCA) funds are required to comply with the policies and procedures contained in the CPCS [Court Cost Vendor Manual](#). In general, vendors must maintain adequate documentation to support their billings, including detailed time records of actual hours worked. Required documentation also includes such items as receipts, canceled checks, and mileage records. Vendors must be able to adequately support their bills. Pursuant to G.L. c. 211D, § 12B and the [Vendor Manual](#), all vendor bills are subject to review and audit.

## **J. ATTORNEY CERTIFICATION REQUIREMENTS**

It is important to become familiar with CPCS certification requirements prior to accepting cases. (See [Chapter 3](#) of this Manual.) Attorneys accepting cases for which they are not certified, or for which there is no right to counsel, will not be paid for those cases. See [Chapter 1](#) of this Manual for CPCS Scope of Services.

## **K. BAIL-ONLY CASES**

An attorney assigned to a case for bail only will be paid only for the arraignment and bail review and not for the full case.

## **L. LATE BILLS**

All bills **must** be received by CPCS within thirty days of the conclusion of the attorney's representation or the end of the fiscal year whichever date is earlier to be eligible for payment in full. For case-closed bills, the last date of service billed is recognized as the date the case concluded. If a case-closed bill is received after 30 days, but within 60 days, it will be subject to a 10% reduction. If a case-closed bill is received after 60 days, the bill will not be paid, absent a finding by the Chief Counsel "that the delay was due to extraordinary circumstances beyond the control of the attorney" pursuant to G.L. c. 211D, § 12(a).

For all cases, attorneys must submit a year-end bill for all unbilled services rendered during the fiscal year and bills must be received by CPCS no later than July 31st. Payment of year-end bills that are received from August 1st to August 31st will be reduced by 10%. End of the year bills received on or after September 1st will not be paid, absent a finding by the Chief Counsel "that the delay was due to extraordinary circumstances beyond the control of the attorney" pursuant to G.L. c. 211D, § 12(a).

Additionally, payment of late bills is dependent on available appropriation funding, and

could be significantly delayed.

If the E-Bill system determines that a bill has been filed late, an automated E-Bill notice will notify the attorney that s/he has missed the statutory deadline. Thereafter the bill will be automatically be processed with a 10% reduction or rejected for payment as required by G.L. c. 211D, § 12(a).

E-Bill Vouchers for expenses incurred and services performed in the prior fiscal year, which are submitted on or after September 1st, cannot be paid pursuant to statute. The attorney has the ability to appeal the denial of payment based on “extraordinary circumstances beyond the control of the attorney which prevented timely billing.”

## **M. REPRESENTATION-CONCLUDED BILLS**

Prior to filing a Representation-Concluded Bill (identified in E-Bill as a “case closed” bill), all matters under a single NAC number must have concluded. An attorney cannot file a Representation-Concluded bill if one or more of the matters on the NAC have been resolved, but other matters are still pending.

If it is necessary to reopen a CAFL trial NAC, the attorney must submit a written request. That request form may be obtained by clicking [here](#).

If it is necessary to reopen a NAC (other than a CAFL trial NAC), the attorney must submit a written request to reopen the NAC to the Accounts Payable Department of CPCS. The request should include the NAC number, client name, and an explanation as to why the case needs to be reopened. If a client is being surrendered on a case on which a Representation-Concluded Bill was filed, the NAC cannot be reopened; a new NAC must be obtained from the court.

## **N. DETERMINING WHEN REPRESENTATION IS CONCLUDED**

### **1. Criminal, Juvenile Delinquency, Youthful Offender and SDP Proceedings**

In the above proceedings, representation is considered concluded for billing purposes as of the date of any of the following events:

- a. willful default of client
- b. disposition hearing\*
- c. plea hearing or trial\*
- d. attorney withdraws from the case
- e. attorney reports case to Bar Advocate program or CPCS for reassignment

\* NOTE: Even if a client is placed on probation, or given a continuance without a finding, the conclusion of the case for billing purposes is the date of the hearing or court decision, not the end-date of the probationary term.

If a juvenile in a juvenile delinquency or Youthful Offender matter is committed to DYS, assigned trial counsel must **continue to provide representation for the initial case conference (called the "staffing"), at any classification proceedings and Regional Review Team (RRT) Hearings, and at any Extension Hearings.**

## **2. Revocation Advocacy Proceedings (GCL)**

Representation begins once a client accepts an attorney for the revocation process. Representation ends at one of the following points:

- a. If the case transfers to another revocation attorney, representation ends after Counsel has fully cooperated with successor counsel in transferring the case to successor counsel, and upon request and with permission of the client, provided successor counsel with the client's entire case file, including work product.
- b. If the case does not advance to the Regional Review Team (RRT), and neither the client nor the caseworker appeals the hearing decision, representation ends after a closing conversation with the client following the hearing.
- c. If after the hearing the case advances to the RRT, and neither the client nor the caseworker appeals the hearing or RRT decision, representation ends after a closing conversation following the RRT meeting.
- d. If either the client or the caseworker decides to appeal the hearing decision, or if the client decides to appeal the decision of the RRT, the period of representation continues until the appeal decision is received and discussed with the client.
- e. If, during the course of representation, the client determines that he or she does not want representation for the revocation process, representation ends after notifying the Revocation Advocacy Coordinator, the Hearing Officer and any other parties involved in scheduling the revocation hearings in counsel's region.
- f. If concerns remain which are intrinsically tied to the youth's revocation disposition, or if client wishes to explore remedies beyond DYS appellate procedure, counsel shall consult with YAD Revocation Coordinator or Trial Panel Director to seek express permission to leave the case open for continued representation.

## **3. Children and Family Law Proceedings**

In children and family law proceedings, representation at the trial level is

considered concluded for billing purposes as provided in the CAFL performance standards section titled [Scope of Representation](#).

Cases that are inadvertently closed by the attorney during the billing process may be re-opened upon written request. Forms for re-opening such cases are available in the CAFL section of the CPCS website. However, a case cannot be re-opened, if there is no longer a right to counsel in the proceeding.

See [Chapter 1](#) for a list of proceedings in which there is a right to counsel. For example, there is no right to counsel in an action to enforce an open adoption agreement under G.L. c. 210, §§ 6C-E.

#### **4. Mental Health Proceedings**

In mental health proceedings, representation is considered concluded for billing purposes as follows:

- a. Civil Commitment (no judicial review ordered): After explaining the disposition and appellate rights to the client and, when requested to do so by the client, upon filing a Notice of Appeal.
- b. Civil Commitment (judicial review ordered): Billing is permissible until the judicial review takes place. Upon conclusion of the judicial review, the case is considered concluded for billing purposes.
- c. Substituted Judgment (Rogers): Billing is permissible until expiration of the order. Upon expiration of the order, the case is considered concluded for billing purposes.

#### **5. Sex Offender Registry Board Proceedings**

In Sex Offender Registry Board (SORB) matters, representation is considered concluded for billing purposes as of the date of any of the following events:

- a. Date when client elects to waive SORB hearing;
- b. Date when client elects not to appeal SORB hearing examiner decision;
- c. If client cannot be located after due diligence; date on which motion for leave to late file client affidavit of indigency in Superior Court has been denied or case is dismissed due to failure to file affidavit of indigency;
- d. Date when client elects not to appeal Superior Court judge's decision reviewing the SORB hearing examiner's decision;
- e. Date when attorney has completed procedures for referring a SORB case to CPCS for appointment of appellate counsel;
- f. Date when attorney is informed by CPCS that the case has been reassigned.

## 6. Defaults

If a client defaults, the default date is considered the representation concluded date (see [Item M](#) above). When and if the client reappears, the same attorney should resume representation, using the same Notice of Assignment of Counsel number. The attorney must also submit to CPCS a written request to re-open the case.

Immediately following the resumption of representation, the attorney should notify the CPCS Accounts Payable Department in writing that the case was reopened due to the reappearance of a defaulted client or for another appropriate reason.

## O. PROBATION SURRENDERS

Probation surrenders require a new assignment from the court. The new NAC is necessary in order for CPCS to maintain accurate records of probation surrenders of CPCS clients.

## P. ANNUAL CASELOAD LIMITS

To assure both the equitable distribution of cases to qualified private counsel and the quality of representation, the Committee has adopted a weighted system of caseload limits, with a particular weight for each type of case assignment and an absolute limit of 250 cases per year. The weight accorded to each type of case is as follows:

District Court jurisdiction criminal cases	(weight=1) (250)
Superior Court jurisdiction criminal cases	(weight=2) (125)
Youthful Offender cases	(weight=2) (125)
Delinquency cases	(weight=1.5) (165)
Revocation Advocacy cases	(weight=1) (250)
Children and Family Law cases	(weight=2) (125)
CRA cases	(weight=1) (250)
Mental Health cases	(weight=1.5) (165)
Sex Offender Registry Board cases	(weight=1.5) (165)
Sexually Dangerous Person cases	(weight=2) (125)

Each category of cases represents 100 percent of an attorney's allowable caseload. Thus, during a fiscal year, if an attorney is assigned 125 District Court criminal cases, that would represent 50 percent of the number of cases which could be accepted. The attorney could accept 100 District Court criminal cases, 50 Superior Court cases and 25 Youthful Offender cases in one year. Or the attorney could handle 100 Delinquency cases, 25 Care

and Protection cases, and 50 District Court criminal cases in one year. Any combination of cases in each category with a weighted value adding up to the maximum caseload of 250 will represent a 100 percent caseload.

Some cases are so complex that additional limits are warranted. Thus, Care and Protection case assignments are limited to 75 open cases at any one time and all CAFL cases to 100 open cases at any time. In addition, although Superior Court criminal and Sexually Dangerous Person (SDP) cases are weighted at a value of 2 for the purpose of calculating a mixed caseload as described above, no attorney may be assigned more than 100 new Superior Court criminal, or 100 Youthful Offender, or 20 new SDP cases in a fiscal year.

If unusual circumstances indicate that the welfare of a client requires that these caseload limits be exceeded, the attorney seeking to exceed the limit may seek prior approval from the appropriate Deputy Chief Counsel.

"Bail only" cases, "bail review" cases, and cases under G.L. c. 112, § 12S (petitions of minors seeking judicial consent), G.L. c. 123, § 12(e) ("warrants of apprehension"), and G.L. c. 123, § 35 (commitment for alcohol or substance abuse) do not count towards the case load computation.

Defaulted cases count as a case; therefore, in the event that a defaulted client reappears at a later date, the client should be reassigned to the originally assigned attorney, under the same Notice of Assignment of Counsel.

Superior Court and District Court jurisdiction cases are determined by the severity of the charge, and not by the court of origin or disposition (see G.L.c.218, § 26).

Youthful Offender cases are determined by the type of charge, and not by the actual indictment or potential for indictment of a juvenile. Any case in which a juvenile client of any age under 18 (including children under 14) is charged with an offense listed as a CPCS Presumptive Youthful Offender charge (see [Chapter 3\(C\)](#) of this Manual for the most recent list of the CPCS Presumptive YO charges) will count as a Youthful Offender case. Additionally, any juvenile case in which the prosecutor indicts the juvenile also counts as a Youthful Offender case, regardless of whether the offense is listed as a CPCS Presumptive YO charge.

It is each attorney's responsibility to keep track of his or her caseload. NACs assigned to attorneys who exceed the Committee's caseload limits will be rejected and attorneys will not be compensated for services provided. Case assignments in excess of the Committee's limits will be reassigned. Attorneys may request approval to remain on the case when in the interest of the client.

## **Q. BILLABLE HOURS LIMIT PER FISCAL YEAR**

Pursuant to G.L. c. 211D, § 11(b), attorneys are limited to 1,650 hours per fiscal year; attorneys, cannot be paid for any time billed in excess of the annual limit on billable hours. The cap is intended: 1) to enhance the quality of representation provided to CPCS clients; 2) to achieve a more equitable distribution of assignments among CPCS-certified counsel; and 3) as an additional guard against over-billing.

Attorneys who exceed the billable hour limit will not be compensated for hours billed in excess of the annual cap. To avoid prejudice to clients, and to fulfill one's ethical responsibility to provide fully competent representation to every client, attorneys must continue to zealously advocate on behalf of all clients for whom assignments have been accepted, despite having exceeded the cap on billable hours.

It is each attorney's responsibility to keep track of his or her billable hours. After an attorney has reached the statutory cap on billable hours in a fiscal year, the attorney shall not accept new case assignments for the remainder of that fiscal year.

In keeping with subsection (c), the statutory 1,650 fiscal year hours limit may be raised to not greater than 2,000 fiscal year hours upon a finding by the Chief Counsel that: (i) there is limited availability of qualified counsel in that practice area; (ii) shifting the services to private counsel would result in cost efficiencies; or (iii) shifting the service to private counsel would improve the quality of service.

The Chief Counsel will make a determination if this statutory test has been met. CPCS will notify counsel accordingly concerning eligibility to exceed the usual limits and any specific billing policies associated therewith.

The hours that an attorney bills for work s/he performs as an associate on CPCS cases are included in, and count towards, the attorney's billable hours limit per fiscal year. An attorney who has billed in excess of the annual cap may not bill as an associate or paralegal, or for any other services on other CPCS case assignments. Further, an attorney who has billed in excess of the annual cap may not bill for an associate or paralegal to complete work on open cases.

## **R. MONTHLY INTERIM BILLING**

It is strongly recommended that attorneys submit E-Bills monthly.

CPCS will process monthly bills for payment in accordance with the following procedures:

1. Monthly billing is limited to one interim bill per NAC number per month. Once an interim bill for a NAC is submitted, another interim bill cannot be submitted until the following month.
2. If dates for a particular month have been inadvertently omitted, those dates may be included with the following month's bill, as long as the dates do not cross fiscal years. However, all time worked on a date must be submitted on a single Ebill. Additional time cannot be added on a date which has been previously billed.
3. Once a fiscal-year-end bill has been submitted, no additional dates or hours for that fiscal year can be billed.
4. An attorney can file an interim bill, a case-closed, and a year-end bill on the same NAC in the same month, but year-end bills may not be submitted prior to June 15.
5. All fiscal-year-end bills must be received by CPCS no later than July 31<sup>st</sup> and all bills for cases in which representation has concluded must be received within 60 days of the last billable date of service (or July 31<sup>st</sup> whichever is sooner) to be eligible for full payment. Late bills are subject to automatic statutory 10% reduction or rejection pursuant to G.L. c. 211D, § 12. See [Item L](#) above for a detailed summary of the statutory billing deadlines.
6. See [Item KK](#) of this Chapter (Assigned Counsel Manual, [Chapter 5](#)) for the Attorney Payment Schedule.

The timing of all payments is subject to appropriation availability.

## **S. TEN-HOUR DAILY BILLING LIMIT**

Attorneys are limited to billing actual and reasonable time for legal services up to a presumptive maximum of ten billable hours per day. Bills submitted in excess of ten hours per day will be reduced to ten hours. The presumptive daily billing limit is twelve hours for dates the attorney was actually on trial and billed trial hours.

The ten-hour daily billing limit does not imply that all dates on which ten hours or less are billed are accepted by the Committee as accurate and allowance or reduction of a request is not tantamount to an audit of the hours billed on the waiver date. Cumulative daily hours billed must represent the actual and reasonable time spent working, be properly documented, and be in conformance with all CPCS policies and procedures and hours billed are subject to later audit.

An attorney may request from the Audit and Oversight Department a waiver of the presumptive ten-hour billing limit by submitting a Request for Waiver Form prior to billing for each date the attorney wishes to be compensated for time in excess of ten hours. Each date for which the attorney wishes to be compensated for more than ten hours requires a separate form. If the request for waiver is for time in excess of twelve hours, the Department may request additional information or documentation prior to consideration of the waiver.

The Request for Waiver form can be found in the [Appendix](#). Once the form is completed, it should be saved or printed prior to submitting it; otherwise the data may be lost. Next, the “Submit by E-mail” button in the upper right-hand corner of the form should be clicked. The completed waiver request will then be automatically sent to [waiver@publiccounsel.net](mailto:waiver@publiccounsel.net). Attorneys should print a copy of the form for their records. Waivers must be submitted after providing the services and before billing for more than ten hours for services performed on the requested waiver date.

The Request for Waiver form must be submitted as early as possible - ideally, the day after the attorney concludes a workday on which s/he performed more than ten billable hours of service on assigned cases.

If the attorney submits bills exceeding ten hours at any time after submitting a waiver, but before the waiver is approved, the attorney will be limited to a maximum of ten billable hours on that date. CPCS will not make adjustments of data entry errors made by attorneys, however inadvertent. Attorneys must obtain approval of waivers promptly in order to allow time to submit their bills within the statutory deadlines (see [Item L](#)). Attorneys will be notified of the decision on their request for a waiver by e-mail. Any questions regarding waivers should be addressed to [waiver@publiccounsel.net](mailto:waiver@publiccounsel.net).

## **T. TWO-COUNTY LIMIT**

### **1. CAFL, Mental Health, Sexually Dangerous Person (SDP), Sex Offender Registry Board (SORB), Revocation Advocacy, Murder, and Appellate Panels.**

There is no limit on the number of counties applicable to members of these panels except to the extent the acceptance of assignments is limited by the Mental Health assignment policy. See [Chapter 3, Section E \(4\)](#).

## **U. BILINGUAL ATTORNEYS**

### **1. Superior Court (Criminal), District Court (Criminal), Delinquency, and**

## **YO Panels.**

The Committee for Public Counsel Services has adopted a policy to permit inter-county case assignments to bilingual attorneys, to improve access to justice for linguistic minorities. This policy waives the two-county limit on these panels to allow bilingual attorneys to receive additional individual case assignments to represent non-English speaking clients.

Attorneys will be certified as bilingual for these case assignments by submitting to the Committee for Public Counsel Services, Private Counsel Division Director of Criminal Trial Support, information regarding their fluency in a language or languages spoken by significant numbers of the Committee's clients. A list of attorneys certified as bilingual will be circulated to all Bar Advocate Programs.

## **2. CAFL, Mental Health, SDP, SORB, Murder, and Appellate Panels.**

Bilingual attorneys on these panels should submit to the appropriate CPCS Division information regarding their fluency in a language or languages spoken by significant numbers of the Committee's clients. A list of bilingual attorneys will be maintained by the Division and circulated to courts as appropriate.

This policy should be used in concert with case assignment policies to provide the best access to counsel and the best representation possible for our clients.

The Performance Standards published by the Committee for Public Counsel Services apply in all respects to special assignments to bilingual attorneys. The Committee expects counsel to meet regularly with the client, in a professional setting readily accessible to the client. The attorney is responsible for making her/himself available to the client, regardless of geographic distance.

## **V. CHILDREN AND FAMILY LAW CASES: PENDING CASELOAD LIMIT**

The Committee has established the following maximum caseload limits for open Children and Family Law cases that an attorney may carry at one time. Open cases include cases that are both pre-judgment and post-judgment:

- Child Welfare Cases – 75;

A “child welfare” case is defined, for the purposes of the pending caseload limit, as care and protection petitions, including petitions filed in juvenile court under G. L. c. 119, §

24; petitions filed in the probate and family court pursuant to G.L. c. 119, § 23(a)(3); petitions filed pursuant to G.L. c. 210, § 3; permanency hearings under G.L. c. 119, § 29B; where the case arises pursuant to G.L. c. 119, § 23 (a); any other civil action in which a child or an indigent parent is entitled to assignment of counsel pursuant to G.L. c. 119, § 29, *Balboni v. Balboni*, 39 Mass. App. Ct. 210 (1995) or *Adoption of Meaghan*, 461 Mass. 1006 (2012); and appeals of judgments in such cases; or

- CRA cases - 100; or
- 100 combined CRA and child welfare cases, provided that the number of child welfare cases does not exceed 75.

## **W. CHILDREN AND FAMILY LAW CASES: CLIENT CONTACT CERTIFICATION**

A Client Contact Certification form must be completed by all attorneys when submitting their bills through the E-Bill system on all Children and Family Law cases, including CRA cases.

The certification should detail in-person client contact only and must include the client's name, and the date and location of the meeting. If the client is a child, the form should include the name of the substitute care provider. In the event that the attorney represents multiple child clients on the same NAC who are in separate placements, a separate client contact certification form must be provided for each child client. If no client contact is had within the billing period, the form should be completed and marked “No In-Person Client Contact” in the section of the form where contact should be detailed.

## **X. SUBMISSION OF BILLS AND RECORD-KEEPING REQUIREMENTS**

Attorneys who accept assignments through CPCS and who submit bills to CPCS are subject not only to performance evaluations, but also to audits of cases, caseloads and bills. On-site audits may be performed at the attorney's home office and/or business office.

Attorneys must make available to the Audit and Oversight Department all case files and billing documentation. Failure to comply with the Audit and Oversight Department's request(s) for information will result in suspension from eligibility to accept assignments and payments. Attorneys may be subject to repayment of over-billings, as well as payment of interest and penalties. Services that cannot be fully documented or where an unreasonable number of hours is charged will be subject to recoupment. See [Chapter 7](#).

Attorneys should submit interim monthly E-Bills, in accordance with [Item R](#), above and received within the statutory billing deadlines detailed in [Item L](#) of this Chapter, above.

NOTE: All bills (paid and unpaid) are subject to audit by the Committee and/or by the state auditor. Supporting documentation may be requested from attorneys or obtained from the court or other sources. The burden is on attorneys to justify the hours billed.

### **1. Tenth-Hour Increments.**

Attorneys must bill in tenth-hour increments. This means rounding off the amount of time actually spent working as recorded in the attorney's time records in keeping with (B) below to the nearest tenth of an hour. You may not automatically round each separate task up to the next tenth-hour.

For example:

- a. If you spend 5 minutes on a case, you may bill .1 hours. If you spend 8 minutes on a case, you may still bill only .1 hours.
- b. If you spend 8 minutes investigating a case, and 13 minutes interviewing a client, you may bill .1 hours for investigation and .2 hours for client interview.
- c. If you make four 3-minute telephone calls, you may bill a total of .2 hours. You may not bill .1 hours for each of the four separate telephone calls.
- d. If you perform only one task during the entire day for all your CPCS cases you may round this one task to a tenth-hour. For example, if you make only one 3-minute phone call and perform no other services on behalf of any CPCS clients the rest of the day, then you can bill .1 hours for that one telephone call. However, if you make a second 3-minute phone call on another CPCS client later in the day, you may not bill more than the original .1 hours. The combined time it takes to perform all tasks for CPCS clients in one day should be rounded to the nearest tenth-hour and billed accordingly.

Your bills should reflect the total actual time you spent on your cases each day. You may find you cannot bill for every single item of work you performed if the tenth-hour increments would inflate your billable hours beyond actual hours worked and documented.

### **2. Client Case Files and Time Records**

Attorneys are required to maintain case files for all CPCS clients containing, but not limited to, running sheets; discovery received; notes of all client interviews; records of contact with possible witnesses (percipient and expert), other counsel; notes on case strategy; prepared pleadings or discovery requests, motions, affidavits and memoranda and all other documents prepared, reviewed or received in each case; drafts of documents prepared for opening and closing statements, direct and cross-examination; and all other pertinent materials whether or not filed. If the attorney conducted legal research, a summary of the legal issues researched, including the materials obtained and/or reviewed, lists of case citations, and all other pertinent materials in accordance with the Performance Standards outlined in [Chapter 4](#).

Any work for which time was billed in the case must be maintained to support the bill(s) submitted. These files must also include a copy of the signed Ebill and detailed contemporaneous time records documenting how much time the attorney spent working that day, where the attorney was, what clients s/he represented, together with a sufficiently specific description of legal services performed.

Time records must minimally include the date of the activity, client name, actual amount of time expended, including both the starting clock time and the finishing clock time, to the maximum extent practical, as well as a description of each task performed. Descriptions of tasks and services must be sufficiently specific and detailed to enable one to understand the nature and extent of the service performed, including, as to legal research, the specific issue(s) researched. Each billable task must be segregated and described separately. Ebill or billing forms may not be used as time records. Billing form category headings shall not be used as time records, as they are not sufficiently specific and detailed descriptions of services.

Attorneys should cross-reference their cases, so that on any given day, their bills for several clients will total the actual amount of time they spent working on cases that day.

Attorneys must record all the work they perform in order to get paid for it and document work performed in the event of an audit. If an attorney does research or prepares a case on a Sunday night, the time must be billed for that Sunday. Work performed on a specific date must be billed for that date, regardless of what day of the week it is, or what time of the day or night. Attorneys should record the starting clock time and the finishing clock time for all work performed, to the maximum extent practical (for example, an attorney working in an office should be able to record clock time, whereas an attorney would likely not be able to do so while handling multiple cases in a busy courtroom).

Attorneys must continue to record all of the time they work on each service date even if the hours exceed the presumptive billing limit. Attorneys must record in their time records but cannot be paid for any hours that exceed the presumptive daily billing limit, unless a prior waiver has been submitted and approved. (See [Item S](#) above.) Attorneys may not bill the excess hours on the next calendar or service date.

For example:

An attorney works 11.4 billable hours in one day, elects not to fill out a waiver form, and bills only 10 hours. The attorney's time sheet must include all 11.4 hours worked, not just the 10 hours billed. Attorneys are reminded that complete and accurate time records are the single most important method of documenting the services provided to your client.

A sample criminal time record and CAFL time record can be found at the end of this chapter at Appendix "[A](#)" and "[B](#)" respectively.

Attorneys are required to keep these contemporaneous time sheets, together with copies of their bills, in their client files for a period not less than six (6) years after the date of submission.

Failure to document work performed in accordance with CPCS billing policies and procedures, or failure to provide documentation to auditors, may result in: 1) the nonpayment of bills; 2) the reduction of amounts paid on bills; 3) repayment assessments for bills that have been paid, together with possible interest and penalties; 4) denial of access to the Committee's billing systems; 5) suspension or removal from assigned counsel panels; and 6) any other appropriate action.

### **3. Non-compensable Activities.**

Attorneys may not bill for routine law office administrative or managerial tasks, nor can they bill for routine case administration tasks. (See also [Item Z](#), Office-Related Expenses.) Routine law office or case administrative tasks include, but are not limited to, the following examples:

- a. Time spent keeping time records, filling out billing forms, or submitting bills;
- b. Notifying clients and/or courts of a change of address for your law office;
- c. Activities considered to be legal training or education;
- d. Notifying court or other entities that you are not certified to accept an assignment or time spent obtaining, correcting or amending a NAC;

- e. Time spent performing secretarial or clerical functions;
- f. The administrative task of creating and closing files.

#### 4. **Waiting Time**

Attorneys may bill for **actual time** spent waiting in court for up to two hours per client for each court date. Attorneys may not bill for more than three hours of waiting time per day for all CPCS clients. Attorneys may not automatically bill three hours per court appearance. The time billed must accurately reflect actual time spent waiting, not to exceed two hours per client or three total hours.

The three-hour daily waiting time limit does not imply that billing three hours or less of waiting time is automatically accepted as reasonable or accurate. Cumulative waiting time hours billed must represent the actual time spent waiting in court that day up to three hours, be properly documented, and be in conformance with all CPCS policies and procedures.

Waiting time does not include time productively spent in court while waiting for a case to be called. In other words, waiting time does not include time spent talking to the client, witnesses, or the prosecutor; it does not include time spent looking at probation records, reviewing the law, or preparing for argument. (Those tasks should be recorded on your contemporaneous time sheets and billed in the appropriate E-Bill billing category.)

Attorneys should bill their waiting time after they have billed for all other services that day. Attorneys may find that they cannot bill for waiting time if the total number of hours billed for other services equals the actual in-court time worked that day.

For example:

- a. The attorney has two clients and waits a total of twenty minutes for the cases to be called. The attorney may bill a total of .3 hours of waiting time. The attorney can bill .2 hours on one client, and .1 hour on the other.
- b. The attorney has two clients and waits thirty-eight minutes for the cases to be called. The attorney may bill a total of .6 hours of waiting time. The attorney may bill .3 hours to one client, and .3 to the second client.
- c. The attorney has two clients and waits one hour and thirteen minutes for the cases to be called. The attorney may bill a total of 1.2 hours of waiting time. The attorney may bill the 1.2 hours to one client; s/he can bill .6 hours to one client and .6 hours to the second client or may divide the total waiting time among her/his clients, as long as the total waiting time does not exceed actual time.

- d. The attorney has two clients and waits two hours for the cases to be called. The attorney may bill 1 hour per client, or two hours on one of the cases.
- e. The attorney has one client with three separate cases (and three separate NACs) scheduled for hearing on the same court date. An attorney who waits three hours may bill a maximum of two hours for that client because billing is limited to two hours per client per day.
- f. The attorney has four clients and waits a total of four hours. The attorney can bill one hour per client for three of the clients for a total of three hours, or two hours for one client and one hour for another client or may divide the maximum three hours of waiting time among the clients represented that day.

## **Y. ASSOCIATES, CO-COUNSEL, AND PARALEGALS**

### **1. Associates**

#### **a. General Rules Regarding Associates**

CPCS makes assignments to individual attorneys, not firms. While CPCS holds the individual attorney responsible for the case to which s/he is assigned, the assigned attorney may engage the services of an associate member of the bar in good standing when necessary to assist in the case.

#### **b. Restricted Tasks**

Associates are restricted to performing the following legal tasks: legal research, legal writing, investigation, review of discovery, drafting correspondence, and client interviewing. Assigned attorneys may not delegate to associates the handling of continuances, hearings, or any part of a trial or oral argument. Associates may not bill for negotiating with opposing counsel, waiting time, travel time and mileage, or expenses.

#### **c. Use of Associates at Trial – All Cases**

Attorneys may use the services of an associate for assistance at counsel table during trial and at hearings. Permissible trial assistance includes taking notes, keeping track of exhibits and documents, conferring with the client, and keeping track of witnesses. Associates who assist at counsel table may not examine witnesses, make arguments before the court at trial or at any hearing, or participate in the presentation of evidence. These in-court activities may only be performed by the assigned attorney. CPCS will process payment to the assigned attorney for the trial assistance services of not more than one associate at each

court event.

**d. Record-Keeping Requirements**

Associates must keep contemporaneous time records, itemizing each date, the time expended, and tasks performed on that date by the associate on the case, including both the starting clock time and the finishing clock time, to the maximum extent practical. The description of tasks and services should be sufficiently specific and detailed to enable one to understand the nature and extent of services provided. Associates are required to comply with the record-keeping requirements applicable to assigned counsel. See [Item X](#).

**e. Billing for Associates' Services**

Bills for associate services must be submitted by the assigned attorney via E-Bill, using the E-Voucher/Associate option. By submitting the associate voucher the assigned attorney and associate attorney acknowledge and accept the terms of the certification contained on the E-Voucher. Assigned Counsel certifies by submitting the associate voucher that full payment of the amount billed has been tendered not later than 7 days following receipt of payment by CPCS. See the [E-Bill Manual](#) for further instructions.

The Associate rate is \$50.00 per hour in all cases except murder cases. Associates in murder cases will automatically be paid at their active certification level (excluding murder) - no written approval is required. When the associate E-bill voucher is entered, the system will populate the hourly rate. The system will automatically adjust the rate based on the certification in the database; however, if the associate is not actively accepting assignments requiring their highest certification, the hourly rate will be lowered to the highest active certification rate or the default associate rate later during bill processing. The associate's hourly rate in all other cases may be increased to the associate's highest hourly active certification rate, or the hourly rate paid to lead counsel on the case, whichever is lower. To request a higher hourly rate, assigned counsel must seek prior written approval from the appropriate Deputy Chief Counsel stating the extraordinary facts and circumstances in the case that necessitate allowance of the higher associate rate. The assigned attorney must attach the allowance to the associate voucher submitted to CPCS. Associate bills already submitted or submitted without the allowance attached will not be adjusted.

CPCS will not reimburse for an associate's waiting time or travel time and

mileage, nor will it pay for an associate's expenses.

CPCS will not process payment for more than 10 hours per day of associate time. The hours that an attorney bills for work performed as an associate on any CPCS cases are included in, and count towards, the attorney's billable hours limit per fiscal year.

An attorney who has billed in excess of the annual hourly billing limit may not bill as an associate on other CPCS case assignments. Furthermore, an attorney who has billed in excess of the annual hourly billing limit may not bill for an associate to complete work on open cases.

Associate Vouchers must be submitted no later than August 31<sup>st</sup> for prior fiscal year services. See [Item L](#) of this chapter.

#### **f. Additional Rules Regarding Associates**

Attorneys may not delegate associate tasks to attorneys suspended by CPCS, nor may attorneys delegate associate tasks to attorneys who have reached the Committee's presumptive daily or statutory annual cap on billable hours. CPCS will not process payment to attorneys for associate services performed by suspended attorneys or by attorneys who have reached the cap(s) on billable hours. Delegation of prohibited tasks to associates is a violation of the CPCS Performance Guidelines and Standards.

### **2. Co-Counsel**

Attorneys may request that CPCS assign qualified co-counsel to assist in the representation of clients in particularly complex cases. Such requests shall be made in writing to the appropriate Deputy Chief Counsel and shall fully describe those unique and complex aspects of the case that indicate that the assignment of co-counsel is warranted.

### **3. Paralegals**

The assigned attorney may engage the services of a paralegal when necessary to assist in the case. CPCS will reimburse for the services of paralegals at the maximum rate of \$35 an hour for the following tasks only: legal research, investigation, client interview, and trial assistance.

Paralegals may not handle hearings, trials, or oral arguments. Such tasks may only be performed by the assigned attorney. CPCS will not reimburse for the paralegal's

waiting time, travel time and mileage, or the paralegal's expenses.

Bills for paralegal services must be submitted by the assigned attorney via E-Bill, using the E-Voucher/Paralegal option. Upon its completion, the paralegal E-Voucher must be printed, signed by both the paralegal and the attorney, and submitted to CPCS accompanied by the paralegal's detailed itemization of dates and tasks performed. The description of tasks and services submitted should be sufficiently specific and detailed to enable one to understand the nature and extent of services provided, including both the starting clock time and the finishing clock time, to the maximum extent practical.

Paralegal Vouchers must be submitted no later than August 31st for prior year services. See [Item L](#) of this chapter.

CPCS cannot pay a paralegal directly. See the [E-Bill Manual](#) for further instructions.

CPCS will not reimburse for more than 10 hours of paralegal services per day. Attorneys must keep appropriate documentation of payments to paralegals. No person compensated for paralegal services may be a former client of the attorney. To qualify for compensation, a paralegal must possess either:

- a. certification from an accredited paralegal education program, or
- b. successful completion of at least one year at an accredited law school, or
- c. prior approval of the appropriate Deputy Chief Counsel.

Attorneys must maintain and provide to CPCS upon request a record of a paralegal's credentials.

An attorney who has billed in excess of the annual hourly billing limit may not bill as a paralegal on other CPCS case assignments. Furthermore, an attorney who has billed in excess of the annual hourly billing limit may not bill for a paralegal to complete work on open cases.

Attorneys may not delegate paralegal tasks to attorneys suspended from practice or suspended by CPCS, nor may attorneys delegate paralegal tasks to attorneys who have reached the Committee's presumptive daily or statutory annual cap on billable hours. CPCS will not reimburse attorneys for paralegal services performed by suspended attorneys or attorneys who have reached the cap(s) on billable hours. Delegation of prohibited tasks to paralegals may be a violation of the CPCS

Performance Guidelines and Standards.

## **Z. OFFICE-RELATED EXPENSES**

### **1. Routine Law Office Overhead**

The Committee will not reimburse for routine law office expenses such as typing, secretarial services, faxing, internet services, or law books. The Committee will not reimburse for subscription costs, membership fees, or monthly service charges for online legal research tools such as Westlaw or LEXIS. Attorneys can, however, bill for their time spent performing necessary online legal research.

### **2. Photocopying and Postage**

The Committee will reimburse for reasonably necessary, properly documented photocopying and postage expenses. An attorney's in-house photocopying will be reimbursed at a rate not to exceed ten cents per page copied.

### **3. Telephone Bills**

The Committee will reimburse for collect and toll calls which are reasonably necessary to the representation of a client, provided that the attorney submits copies of the telephone bills (if required see [Item DD](#) below) for which the attorney seeks reimbursement with those calls highlighted (and other calls redacted if the attorney so chooses).

## **AA. CLIENT PERSONAL EXPENSES**

CPCS generally does not reimburse for a client's personal expenses such as transportation or other services. If a client needs assistance of a personal nature, counsel must seek authorization from the appropriate Deputy Chief Counsel, prior to filing a motion pursuant to G.L. c. 261, §§ 27A-27G, for such expenses. Counsel who receive prior authorization and who obtain a court-approved motion, pursuant to G.L. c. 261, §§ 27A-27G, may receive reimbursement for reasonable expenditures for an incarcerated client's appropriate courtroom attire for appearances at trial, not to exceed \$200. Counsel must provide receipts evidencing the expenses incurred.

## **BB. AUTOMOBILE TRAVEL EXPENSES**

Necessary case-related automobile travel time and mileage is compensable. Attorneys may bill for automobile travel time and mileage in Ebill by selecting the reason for traveling,

the origin and destination of the trip(s), and actual travel time. Attorneys may enter one-way or round-trip travel. Multiple destinations in a single trip may be entered using the one-way option. Attorneys enter actual travel time but do not need to enter actual mileage unless they travel out of state because Ebill is programmed with putative mileage mapping data between all cities and towns in the Commonwealth. Travel time is limited to either the actual travel time or a maximum time estimate based upon mapping and traffic data during a high traffic period whichever is lower. Because the system selects the most direct route the computation may vary slightly depending on the direction. Reimbursement for mileage is paid at \$.62/mile and is calculated by Ebill after the origin and destination city is entered. The mileage reimbursement is standardized in Ebill and cannot be edited.

Please note the process of computing allowed travel time is automatic. Attorneys should enter their actual time and Ebill will calculate the maximum allowable travel time. Attorneys are compensated for their actual travel time or the maximum allowable time, whichever is smaller. Attorneys may not increase their actual travel time to the maximum allowed.

#### The Local Court Travel Exclusion

Attorneys are expected to have an office or other private meeting space near the courts in which they practice that is easily accessible to clients with cases in the court in which they provide assigned representation and that is easily accessible by public transportation. As such, local travel to court where the putative number of round-trip miles is less than 30 is not compensable. The local court travel exclusion may be waived by the appropriate Deputy Chief Counsel based upon a compelling need for representation in a particular under-served court(s).

All other necessary case-related travel (e.g., for client visits and investigations) is compensable and is not subject to the local court travel exclusion.

The local court travel exclusion is applicable to travel to and from court proceedings wherever conducted (e.g., courthouse, mental health facility, hospital).

### **1. Travel Expenses Generally**

Subject to 3 and 4 below, attorney time (actual or allowed) at the hourly rate of the case and mileage at \$.62/mile is compensable for all travel, including travel less than thirty miles round-trip, except travel to and from court. See 2, below, for travel policies for client-visits. See 3, below for travel to and from court. See 4, below, for travel billing procedure. Cumulative travel time hours billed must be properly documented and be in conformance with all CPCS policies and procedures.

## **2. Travel Expenses for Client-Visits**

Subject to [4](#), travel for client visits outside of court is compensable at the hourly rate of the case even if the travel to visit the client does not exceed thirty miles round-trip. Travel time to and from the court to meet a client on the day of court proceedings is considered and must be billed as travel to court and may not be billed as a client visit. (See [3](#), below.) See [5](#), below, for travel billing procedure.

## **3. Travel To and From Court**

Travel to and from court is billable so long as the putative mileage is 30 miles or greater. Local travel to court (or wherever the proceeding is heard) where the putative number of round-trip miles is less than 30 is not compensable absent a waiver by the appropriate Deputy Chief Counsel based upon a compelling need for representation in a particular under-served court.

## **4. Out-of-State Travel**

If out-of-state travel exceeds 300 miles round-trip, the attorney must submit a written request to the appropriate Deputy Chief Counsel (or designee), and receive prior approval before incurring such expenses. If the time expended exceeds the presumptive daily billing limit, the attorney must also seek a waiver in accordance with [Item S](#) above.

## **5. Billing for Travel Expenses**

“Assignment-related travel” includes, but is not limited to, the following:

- a. travel to and from a court for court appearances, if the putative round-trip mileage exceeds 30 miles;
- b. travel to and from the scene of a crime; and
- c. travel to and from other locations in order to interview witnesses, investigate and research a case.

All assignment-related travel is measured and must be billed from the attorney’s nearest office or home to the destination, whichever distance is shorter. A reminder: an attorney’s office must be within reasonable geographic proximity to the court(s) in which the attorney practices.

For example, if an attorney has an office in Worcester and she has a hearing before a Single Justice of the SJC in Boston (which is a distance greater than 30 miles round-

trip) she would be able to bill for compensation for time and mileage by recording in her time records the actual clock time spent traveling and selecting in Ebill her origin and destination and entering her actual travel time.

Failure to record travel time in the foregoing manner may result in delay or non-payment of bill submissions for such travel time.

NOTE: Attorneys may not combine personal and case-related travel. CPCS will not reimburse attorneys for travel that is partially personal in nature.

## **CC. OTHER EXPENSES**

For unusual expenses by type or cost, including travel other than by automobile, authorization from the appropriate Deputy Chief Counsel is required prior to incurring costs. Failure to seek prior approval may result in the Committee denying (or partially denying) a request for reimbursement.

## **DD. EXPENSES: DOCUMENTATION REQUIRED**

The Comptroller of the Commonwealth requires that vendors maintain and produce upon request complete documentation, including all receipts and an itemization of all expenses, prior to reimbursing attorneys for any expenditure. Legible receipts in the form of a canceled check, or other document that clearly indicates that the bill was paid, and indicating the date, amount of expenses, and name of vendor must be submitted with the attorney's E-Voucher.

Attorneys must keep documentary support for E-Vouchers under \$50 for a period of six years. In such cases, attorneys need not submit such documentary support unless requested.

## **EE. EXPENSES: BILLING INSTRUCTIONS**

All attorney bills, including expenses, must be submitted through E-Bill. Expenses are filed using the E-Voucher option. Please see the [E-Bill Manual](#) for further information.

## **FF. DUTY-DAYS**

### **1. Criminal and Delinquency Duty Days [Applies Only to Dates Assigned by County Bar Advocate Programs]**

Duty attorneys who receive no case assignments of any sort (including

arraignment only, bail only or bail review) on their assigned duty-day may be compensated for time spent on duty at the court. Thus if the attorney is on duty at the court for 6 hours without receiving any case assignment, s/he may be compensated for 6 hours; if the duty attorney is released earlier, s/he may be compensated for the lesser time actually spent on duty at the court. This time is compensated at the district court rate.

Attorneys must complete a No-Case Duty-Day form, provided by the county program that assigned the duty day, in order to receive payment from the CPCS. The form must be approved by the program administrator and submitted by the program directly to the Committee. The time for which the attorney is compensated is counted as billed hours.

For purposes of this policy, a “case” includes assignments for arraignment only, bail only, arraignment and bail or one or more bail review(s). Thus, if an attorney is assigned to one case for bail only, the attorney may not seek compensation for a No-Case Duty-Day. The attorney may, however, bill for actual time spent representing the client on that assignment and for actual time spent waiting, up to two hours per client but not more than 3 hours. See [Item X, 4](#) in this chapter.

## **2. CRA Duty Days [Applies Only to Dates Assigned by Through a CAFL- Approved Program]**

CRA duty attorneys who receive no case assignments of any sort (including arraignment only, bail only or bail review) on their assigned duty-day may be compensated for time spent on duty at the court. Thus, if the attorney is on duty at the court for 6 hours without receiving any case assignment, s/he may be compensated for 6 hours; if the duty attorney is released earlier, s/he may be compensated for the lesser time actually spent on duty at the court. This time is compensated at the CRA hourly rate.

Attorneys must complete a No-Case Duty-Day form in order to receive payment from the Committee for the compensable time. The form must be submitted directly to the Committee and be approved by the CAFL Trial Panel Director. [Click here](#) to obtain the request form. The time for which the attorney is compensated is counted as billed hours by the Committee.

## **3. Emergency Authority in Underserved Courts**

If a shortage of available duty day attorneys consistently exists in any court, then the Chief Counsel shall have the authority to declare that a temporary emergency exists in that court with regard to the availability of assigned counsel.

If such a temporary emergency is declared in a given court, then for purposes of billing on duty days in that court only, duty attorneys who receive no more than one case assignment of any sort, (including arraignment only, bail only or bail review) on their assigned duty-day may be compensated for time spent on duty at that court. For example, if the attorney is on duty at the court for 6 hours having received only one assignment, s/he may be compensated for 6 hours; if the duty attorney is released earlier, s/he may be compensated for the lesser time actually spent on duty at the court. The 6 hour minimum is also reduced by time spent handling the one assigned matter and time spent working on other CPCS assignments while on duty, if any, all of which time can be separately billed on the appropriate case NACS. This time is compensated at the district court rate.

Once the Chief Counsel declares that a temporary emergency exists with regard to the availability of assigned counsel in a given court, this status will presumptively continue with respect to the designated court for the remainder of the fiscal year, (which begins on July 1<sup>st</sup> and ends on June 30<sup>th</sup>) and expire on the first day of the ensuing fiscal year, provided however, if the emergency is declared within 90 days of the end of any given fiscal year, then the emergency will continue in existence at the designated court for the remainder of the current fiscal year and throughout the next fiscal year. Provided also however, that the Chief Counsel may declare that the emergency at a designated court is at an end at any time where the shortage of counsel has been satisfactorily ameliorated.

Attorneys must complete a [One Case Duty Day Form](#) in order to receive payment from CPCS. The form must be approved by the bar advocate program administrator and submitted by the program directly to the Committee or in CRA cases to CAFLAttorney@publiccounsel.net. The time for which the attorney is compensated is counted as billed hours.

For purposes of this policy, a “case” includes assignments for arraignment only, bail only, arraignment and bail or one or more bail review(s). For example, if an attorney is assigned to two cases for bail only, the attorney may not seek compensation for a One-Case Duty-Day. The attorney may, however, bill for actual time spent representing the client on those assignments and for actual time spent waiting, up to two hours per client but not more than 3 hours. See [Item X, 4](#) in this chapter.

## **GG. COMPENSATION RATES**

The following delineates the current statutory payment structure for compensation of attorneys assigned through the Committee:

## **1. Matters Paid at \$95.00 Per Hour**

The following types of legal services are paid at the statutory rate of \$95.00 per hour: All cases that require a Superior Court certification, including Sexually Dangerous Person proceedings, wherever the case is heard (rate applies to trial and appeal). Rate does not apply to bail-only or arraignment-only assignments in the District Court.

- a. All cases that require a Youthful Offender certification (rate applies to trial and appeal). If the case involves charges not included in the CPCS Presumptive Youthful Offender list (see Youthful Offender Section of the Certification Chapter of this Manual), but the juvenile was nevertheless later indicted as a Youthful Offender, then the delinquency portion of the case is compensable at \$75.00 per hour until the date of the indictment. The Youthful Offender portion of the case is compensable at \$95.00 per hour, from the date of the post-indictment arraignment until the conclusion of the case. (Attorneys must submit copies of the indictment(s), together with copies of the NAC form, in such cases to CPCS, attention: Youthful Offender Trial Panel Oversight.) The attorney should also get a new NAC for the case once the juvenile is indicted.
- b. Criminal felony charges that are within district court jurisdiction (G.L. c. 218, § 26) are called concurrent felonies because they are within the jurisdiction of both the district and superior courts. The required certification depends on the court in which the case is heard. These cases will be paid at \$75.00 per hour when heard in district court and \$95.00 per hour when heard in superior court.
- c. All post-conviction matters (other than murder convictions).
- d. All Mentors and/or Resource Attorneys.
- e. Bail Petitions heard in the Superior Court.
- f. Petitions for review of sex offender designation (G.L. c. 6, § 178M.) [These are civil cases heard in Superior Court.]

## **2. Matters Paid at \$95.00 Per Hour**

- a. CAFL cases excluding CRA cases.
- b. Minors Seeking Judicial Consent (“Mary Moe”) cases (G.L. c. 112, § 12R, Offense Code 1005).

## **3. Matters Paid at \$75.00 Per Hour**

The following types of legal services are paid at the statutory rate of \$75.00 per hour:

- a. Bails and Bail Reviews on all cases in the District Court.
- b. All appeals from denial of motions for funds in District Court cases heard in the Appellate Division of the District Court or in juvenile cases the Superior Court.

- c. Criminal felony charges that are within district court jurisdiction (G.L. c. 218, § 26) are called concurrent felonies because they are within the jurisdiction of both the district and superior courts. The required certification depends on the court in which the case is heard. These cases will be paid at \$75.00 per hour when heard in district court and \$95.00 per hour when heard in superior court.
- d. All other criminal cases not listed above.
- e. CRA cases.
- f. Probate and Family Court Contempt cases where a criminal complaint has been issued.
- g. Mental Health Cases.
- h. SORB Administrative Hearings.
- i. Writs of Apprehension (G.L. c. 123, § 12(e)).
- j. Commitment for Alcohol or Substance-Abuse (G.L. c. 123, § 35).

**4. Matters Paid at \$130.00 Per Hour**

First and Second Degree Murder trials and murder appeals are paid at the statutory rate of \$130.00 per hour.

**SUMMARY OF HOURLY COMPENSATION RATES**

<b>Case</b>	<b>Compensation Rate</b>
Murder Cases	\$130.00/hour
Cases Requiring Superior Court Certification	\$95.00/hour
Cases (Not Bail-Only Assignments) Requiring Youthful Offender Certification	\$95.00/hour
Substantive Criminal Cases Heard in Superior Court	\$95.00/hour
Criminal Cases not requiring Superior Court Certification Heard in District Court	\$75.00/hour
Juvenile Delinquency Cases not requiring Youthful Offender Certification and GCL Cases	\$75.00/hour
Bail-Only Assignments in District Court	\$75.00/hour
Bail-Only Assignments in Superior Court	\$95.00/hour
District Court Bail Reviews	\$75.00/hour
Bail Petitions in the Superior Court	\$95.00/hour
Mentors in all cases	\$95.00/hour
Petitions for Review of Sex Offender Designation in Superior Court	\$95.00/hour

Mary Moe cases (G.L. c. 112, § 12R)	\$95.00/hour
SDP Commitments & Reviews	\$95.00/hour
Writs of Apprehension (G.L. c. 123, § 12(e))	\$75.00/hour
Commitment for Alcohol or Substance Abuse (G.L. c. 123, § 35)	\$75.00/hour
Concurrent felonies if substantive case heard in Superior Court	\$95.00/hour
Concurrent felonies if substantive case heard in District Court	\$75.00/hour
Children and Family Law cases, excluding CRA Cases	\$95.00/hour
Mental Health Cases and SORB Administrative Hearings	\$75.00/hour
Other Criminal Cases not mentioned above	\$75.00/hour
CRA Cases	\$75.00/hour
Continuing Legal Education ( <a href="#">See Item II</a> )	\$95.00/hour

## HH. DOCKET ENTRY AND DOCUMENTATION REQUIREMENTS

Attorney bills and case handling practices are subject to review by CPCS and attorneys may be required to provide docket sheets and other records on individual cases.

## II. CONTINUING LEGAL EDUCATION

CPCS will pay attorneys for up to eight CLE (8) hours **required by CPCS** per fiscal year. The fiscal year period runs from July 1st to June 30th. **Payment for required CLEs will be made only if and after an attorney has billed 600 hours for CPCS assignments in that fiscal year.** No compensation will be made for CLEs attended in a fiscal year where the attorney has not billed 600 hours. CPCS will track the number of required CLE hours taken (even before the 600 hour threshold is reached), but payment will occur only after the 600 hour threshold is met. Payment will only be for up to 8 accrued required CLE hours and those hours are counted toward the statutory cap on billable hours.

If a training fulfills the requirements for more than one panel, credit for the training will be applied to maintain certification to the associated panels, but required CLE hours payment will be calculated only for the actual CLE time (e.g., if 2 hours of training applies to maintain certification for both panel A and panel B, payment would be for the 2 hours of training, not 4 hours).

## **JJ. REPEALED**

## **KK. ATTORNEY PAYMENT SCHEDULE**

All bills that have been received in good order by the 15th of the month (excluding bills subject to review or audit) will be processed and forwarded to the Office of the State Comptroller (OSC) for payment within 7 business days of the 15th. If the 15th falls on a Saturday, Sunday, or a holiday during the next transmission of bills to OSC, CPCS will include all bills received in good order through 11:59 p.m. of the next business day after the 15th.

All bills received in good order between the 16th and the last day of the month will be processed and forwarded to OSC for payment within 7 business days of the last day of the month. If the last day of the month falls on a Saturday, Sunday, or a holiday, during the next transmission of bills to OSC, CPCS will include all bills received in good order through 11:59 p.m. of the next business day.

This policy does not change the monthly billing policy permitting no more than one interim bill per assignment number (NAC) per month, as specified in [Item R](#) of this chapter. If the date of expected CPCS transmission to OSC falls on a Saturday, Sunday, or a holiday, the bills will be transmitted before 5 p.m. of the next business day.

The timing of all payments is subject to appropriation availability.

## **APPENDIX A: SAMPLE CRIMINAL TIME RECORD**

[Criminal Time Record](#)

## **APPENDIX B: SAMPLE CAFL TIME RECORD**

[CAFL Time Record](#)

## **6. Court Costs of Indigent Persons Fund G.L. c. 261, §§ 27A-G**

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### **A. INTRODUCTION**

Zealous advocacy often requires incurring expenses in preparing and presenting a client's case. For example, it may be advisable to obtain an interpreter to assist in witness interviews or an expert to conduct a blood analysis. Attorneys should familiarize themselves with G.L. c. 261, §§ 27A-27G (the Indigent Court Costs Act or ICCA), which provides for the payment of expenses through the Indigent Court Costs Fund.

## **1. GENERAL GUIDELINES FOR OBTAINING FUNDS FOR DEFENSE COSTS**

Generally, it is necessary to obtain prior written approval from the court for expenses by filing a motion under the ICCA with a supporting affidavit of counsel.

Counsel should research the law and prepare an argument for hearing before the judge on this motion. If the motion is denied, the attorney should appeal the motion to the Appellate Division of the District Court, the Superior Court, or the Appeals Court, depending on which court has jurisdiction. (See G.L. c. 261, § 27D). This notice of appeal must be filed within seven days. When an allowed motion is required, counsel should not engage the services of an expert or incur other expenses until written court approval for the requested funds under the ICCA has been received.

Service providers bill CPCS directly. Attorneys are required to verify work performed by approving the most service provider's Vbills. Please note that attorneys may not receive any personal or professional benefit from selecting or using an expert. An expert should be selected by the attorney based upon the expert's qualifications and suitability for the case. For assistance in obtaining the names of qualified experts, contact the appropriate panel at CPCS or the Forensic Services Director of CPCS, or check the CPCS website. A sample "Motion for Expenses" and a sample "Affidavit in Support" can be found in [section 7](#) below. Information regarding reimbursement of expenses can be found in [section D](#) below.

## **2. EXPERT QUALIFICATIONS AND RATES**

The [Court Cost Vendor Manual](#) contains detailed policies and procedures related to vendor services and billing. Counsel must be aware of the qualifications required and rates paid for the service sought in the case. Please click [this link](#) for a list of the CPCS Expert Qualifications and Rates found in Chapter 5 of the [CPCS Court Cost Vendor Manual](#).

Counsel should always inquire prior to engaging an expert or service provider whether they are approved to receive payments from CPCS and whether they are aware of the applicable rates of payment. New vendors should be directed to the [Court Cost Vendor Manual](#) and should receive written notice of acceptance from the Accounts Payable Department prior to accepting an engagement. All payments are made in keeping with the policies contained in the [Vendor Manual](#).

### 3. UNUSUAL OR EXTRAORDINARY EXPENSES

Prior to filing a motion for unusual or extraordinary expenses, counsel must first obtain prior written authorization from the appropriate Deputy Chief Counsel, Managing Director of the CAFL Public Division or Managing Director of the Family Justice Advocates (CAFL Conflicts Office). (See [Chapter 5\(CC\)](#).) After receiving the required written authorization, the attorney must **also** obtain allowance of motion for expenses, as outlined in [Section 1](#) above. Some examples of unusual or extraordinary expenses are:

- i. Expenses required to obtain the services of an expert whose *rates exceed* the range of CPCS published rates, *see Chapter V of the CPCS Court Cost Vendor Manual: Qualifications and Rates for Investigators, Social Service Providers and Expert Witnesses* by clicking on this link: [Vendor Manual](#).
- ii. Expenses for an expert whose *qualifications do not meet* the “CPCS Qualifications and Rates for Investigators, Social Service Providers and Expert Witnesses.”
- iii. Expenses required for an expert witness traveling from out of state.
- iv. Expenses involving unusual expertise, services, or products.

### 4. ORDINARY COSTS OF LITIGATION

Please note that for certain ordinary costs of litigation, attorneys may not need to file a motion for expenses under G.L. c. 261, §§ 27A-G, or obtain prior authorization from the appropriate Deputy Chief Counsel. For example, an attorney need not file a motion or obtain prior authorization for the following:

- i. interpreter services payable on a case not exceeding the amount of \$500.00, paid at the standard rate.
- ii. transcripts for direct appeals, regardless of cost, paid at the standard rate.
- iii. other transcripts under \$1,000.00, paid at the standard rate.
- iv. service of process.

### 5. NEW TRIAL MOTIONS

Any request for funds in connection with a motion for new trial pursuant to Mass. R. Crim. P. 30(c) is not within the scope of G.L. c. 261, §§ 27A-G, but should instead be made pursuant to Rule 30 itself.

**6. APPELLATE REVIEW WHEN MOTIONS FOR FUNDS IS DENIED  
(G.L. C. 261, § 27D)**

If a motion for funds is denied, a notice of appeal must be filed within seven days. This notice of appeal must be filed in the office of the clerk of the court which heard the motion.

A stay of proceedings pending appellate resolution of the funds issue should also be requested.

The judge must file written findings concerning his denial of the motion within three days of receiving the notice of appeal.

The clerk will forward the motion and findings to the single justice of the Appeals Court if the motion was denied in Superior Court, to the Appellate Division of the District Court if the motion was denied in District Court, or to the Superior Court if the motion was denied in the Juvenile Court. A hearing on the appeal will be scheduled by the clerk of the applicable appellate forum.

**7. SAMPLE MOTION FOR EXPENSES AND AFFIDAVIT IN SUPPORT**

See below for a sample Motion for Expenses and a sample Affidavit in Support:

**SAMPLE MOTION FOR EXPENSES**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
Docket No.

COMMONWEALTH

V.

[RICHARD ROE]

MOTION FOR EXPENSES

Richard Roe respectfully moves this Court, pursuant to G. L. c. 261, § 27C, to authorize the expenditure of funds not to exceed \$500.00 to retain John Doe, a fingerprint expert.

Mr. Roe states that the requested funds are "reasonably necessary to assure [him] as effective a . . . defense as he would have if he were financially able to pay." G. L. c. 261, § 27C(4); Commonwealth v. Bolduc, 383 Mass. 744, 748 (1981); Commonwealth v. Lockley, 381 Mass. 156, 164 (1980).

[RICHARD ROE]

By his attorney:

\_\_\_\_\_  
[Attorney Name]

**SAMPLE AFFIDAVIT IN SUPPORT OF MOTION FOR EXPENSES**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
Docket No.

COMMONWEALTH

v.

[RICHARD ROE]

AFFIDAVIT IN SUPPORT OF MOTION FOR EXPENSES

I, [Attorney Name], state under oath that:

- 1 Richard Roe was found indigent by a Justice of the Suffolk Superior Court at his arraignment on [Date]. Mr. Roe remains indigent and has no funds to engage the services of a fingerprint expert.
2. Richard Roe is indigent as indicated in the attached “Affidavit of Indigency and Request for Waiver, Substitution or State Payment of Fees and Costs” and “Supplement to Affidavit of Indigency.”
3. John Doe is a qualified expert. I have discussed the issues in this case with him, and he has advised me that the cost of analyzing the fingerprint evidence and preparing a report will be \$500.00. Additional funds will be needed to compensate him for his time if it becomes necessary for him to appear in court.

The above is true to the best of my information and belief and is signed under the pains and penalties of perjury.

\_\_\_\_\_  
[Attorney Name]

## B. ISSUES REPRESENTING INDIGENT PERSONS UNDER THE ICCA

Service providers bill CPCS directly through Vbill and are paid in keeping with billing policy. CPCS billing policy and rates of payment are detailed in the CPCS [Court Cost Vendor Manual](#).

Statutory provisions for the payment of fees and costs on behalf of indigent persons are found in G.L. c. 261, §§ 27A-27G.

In order to obtain funds, counsel must show that:

The person is indigent. This can be established by filing an “*Affidavit of Indigency and Request for Waiver, Substitution or State Payment of Fees & Costs*” form <http://www.mass.gov/courts/docs/forms/sjc/affidavitofindigency.pdf> and, if necessary, a “*Supplement to Affidavit of Indigency*” form (<http://www.mass.gov/courts/docs/forms/sjc/supplementaffidavit.pdf>), both as issued by the Supreme Judicial Court. In some courts, an assertion by affidavit of counsel that s/he was appointed upon a previous finding that the person was indigent will suffice.

Counsel must also show that requested expenses are "reasonably necessary to assure the applicant as effective a ... defense ... as he would have if he were financially able to pay." G.L. c. 261, § 27C(4).

“The test is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires.”

*Commonwealth v. Lockley*, 381 Mass. 156, 160-161 (1980).

To obtain authorization for the payment of an expert, counsel must file a motion stating the amount of money needed, the purpose of the expenditure, and why the expenditure is "reasonably necessary." In criminal cases, the motion must be accompanied by an affidavit detailing the "facts relied upon in support of the motion" and must be "signed by a person with personal knowledge of the factual basis of the motion." Mass. R. Crim. P. 13(a)(2). A similar requirement applies to motions filed in care and protection/termination of parental rights cases in Juvenile Court. Juv. Ct. Rule 5.

Although the authorizing statute provides that the court "shall not deny any request with respect to extra fees or costs if it finds the document, service or object is reasonably necessary" (and "shall not deny any request without first holding a hearing thereon"), G.L. c. 261, § 27C(4), appellate courts have scrutinized affidavits in this context and have on occasion found them inadequate.

In order to make the necessary representations in the affidavit concerning costs of services, counsel may need to have a preliminary discussion with a potential expert.

## **1. EX PARTE MOTION**

Counsel should ask that a motion for funds be allowed without a hearing. The court should grant that request if the "reasonable necessity" of the funds sought is established in the motion or affidavit in support of the motion. If the court determines that a hearing is necessary, counsel should ask that it be conducted *ex parte* to avoid disclosing key aspects of his or her case. See *Commonwealth v. Dotson*, 402 Mass. 185, 521 N.E.2d 395 (1988) (prosecution has no role to play in defendant's motion for public payment for expert witness under G.L. c. 261, § 27C). An *ex parte* motion remains a part of the public record of a case unless the motion is impounded. Therefore, counsel should move to impound the motion.

CAUTION: The information gathered and the opinions formed by an expert "belong" to the client and are not discoverable by opposing counsel (or to be shared with the court) unless the expert will be called by counsel to testify or the expert's report, if any, will be proffered at the hearing. *Thompson v. Commonwealth*, 386 Mass. 811, 819, 438 N.E.2d 33, 38 (1982) (facts known and opinions held by independent physician to be treated the same as if physician had been hired privately); *Commonwealth v. Haggerty*, 400 Mass. 437 at 441 (1987). The court should not draw any adverse inferences from the respondent's decision not to use the report as evidence in his or her case.

## **C. INFORMATION ON SELECTED ICCA SERVICES**

### **1. INTERPRETERS**

The Committee pays interpreters for OUT-OF-COURT services which have been requested and allowed by motion filed by counsel on behalf of an indigent client. CPCS does not pay for in-court interpretation.

If the total interpreter services billed for the case is \$500.00 or less, no motion is required.

CPCS will pay interpreters for the deaf and hard of hearing in accordance with the rate structure established by the Massachusetts Commission for the Deaf and Hard of Hearing (MCDHH).

## **2. TRANSCRIPTS**

The Committee pays transcribers for transcripts which have been requested and allowed by motion filed by assigned counsel on behalf of his/her indigent client. In addition CPCS will pay for transcripts requested by the court as a direct result of Assigned Counsel's notice of appeal.

Please note: transcripts for direct appeals paid for at the standard rate, regardless of cost, and other transcripts paid for at the standard rate, if under the cumulative amount of \$1,000.00, are considered ordinary costs of litigation. See [Item A\(4\)](#). Therefore, neither a motion for funds nor prior authorization is necessary for such transcripts.

## **3. COURT REPORTER ATTENDANCE**

CPCS will pay court reporters for court attendance if requested and allowed by motion filed by counsel on behalf of his or her indigent client.

## **4. PUBLIC NOTICE**

CPCS will pay for publication of notices accompanied by proof of indigency or allowed by motion filed by assigned counsel on behalf of his or her indigent client.

## **5. SERVICE OF PROCESS**

At the request of counsel, deputy sheriffs and service of process providers are paid for serving process on behalf of an indigent client at the rate allowed under G.L. c. 262, § 8. Attorneys need not file a motion for expenses or obtain prior authorization for payment of service of process.

## **D. PAYMENT FROM THE INDIGENT COURT COSTS FUND**

The company or person who performs services is required to submit a Vbill and is paid directly by CPCS.

## **1. REIMBURSEMENT OF EXPENSES**

In the vast majority of cases, CPCS pays the service provider directly. In a case in which counsel pays the court cost vendor directly and then seeks reimbursement, counsel must be aware of the rates of payment, required qualifications, and CPCS billing policies contained in the [Court Cost Vendor Manual](#) to ensure reimbursement. Monies cannot be advanced.

Furthermore, the Comptroller of the Commonwealth requires complete documentation, including all receipts and an itemization of all expenses, in order to reimburse attorneys for any expenditure. These receipts must be maintained for seven (6) years. The vendor's time records, kept in accordance with the requirements of the [Court Cost Vendor Manual](#), as well as an itemized bill and legible receipts in the form of a canceled check, or other document that clearly indicates the date the bill was paid must be submitted with the attorney's E-Bill voucher confirmation page prior to payment of any expense exceeding fifty dollars (\$50.00). Requests for reimbursement must be submitted timely. Payment of late bills is controlled by statute. Late bills are reduced or rejected for payment under c. 211D, § 12 (see [Item L](#)).

# 7. Audit and Oversight Procedures

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### A. PREAMBLE

Pursuant to G.L. c. 211D, § 12, the Audit and Oversight Department, hereinafter referred to as “The Department,” is responsible for monitoring the billings of private counsel who accept assignments through the Committee and vendors who provide services to CPCS clients. The Department reviews bills to ensure that the services billed were provided to the client, that the bills submitted are reasonable in terms of both dollars charged and hours billed, and that the attorney maintains his or her billing records and files in compliance with CPCS billing and record-keeping requirements.

### B. AUTHORITY

The Committee shall have the authority, through the Department and through its other administrative divisions, to examine, suspend, reduce, or decline payment of bills submitted, suspend the acceptance of assignments, reassign cases, and take any other action deemed necessary or appropriate.

This chapter provides general information regarding the specific audit types described herein and shall not be interpreted to limit or restrict the authority of the Committee to otherwise examine caseloads and bills. Further, these procedures may be used independently or in concert with other types of audits, reviews or supervision performed by the Committee’s various divisions.

In the event serious billing irregularities or the appearance of fraudulent billing comes to the attention of CPCS Staff, the Audit and Oversight Department may immediately suspend the payment of all bills and the acceptance of cases and recommend the reassignment of existing cases.

## **C. AUDIT AND OVERSIGHT PROCEDURE – FULL AUDITS**

The following procedure will be followed where irregularities come to the attention of CPCS staff and a full audit of the Attorney’s caseload and/or bills is contemplated.

### **1. PRELIMINARY INVESTIGATION**

- a. A preliminary investigation will be undertaken by Department staff to (1) ascertain whether the attorney erred in recording information submitted, over-billed for services provided or otherwise engaged in questionable practice(s), and (2) determine whether or not there is a pattern of such practice(s).
- b. Based upon the results of the preliminary investigation, if the Department determines that an audit will be performed, the attorney will be mailed an “Audit Letter.”
- c. The Department may suspend the payment of any bill(s) pending review of same.

### **2. AUDIT LETTER, RESPONSE, TIMING**

- a. A Respondent attorney (hereinafter “attorney”) shall cooperate with the Department’s request for information and shall have thirty (30) days, from the date of receipt, to respond to the Audit Letter and provide documentation including but not limited to, contemporaneous time sheets, notes, file materials, and other documents requested by the Department. Redacted documents may be provided if necessary to protect the interest of the client or as required by statute or rule.
- b. An attorney shall have one automatic fifteen (15) day extension to respond to the Audit Letter upon written request (not less than five (5) days prior to the thirty (30) day deadline) to the Audit and Oversight Department.
- c. An attorney shall have no further extensions of time to respond to the Audit Letter, except upon written notice of extraordinary circumstances (not less than five days prior to the forty-five (45) day deadline). Such requests should contain a description of the circumstances warranting the extension and should be forwarded to the Department. Such requests will be considered by a Hearing Officer based upon the facts presented unless the Department agrees in writing to extend the time.

- d. The requested documents must be provided in the initial reply to the Audit Letter pursuant to the timelines herein in order to be considered as supporting the services provided and bills submitted. The Department shall not assume the existence of documents, relevant information or other facts not provided in the initial reply. Assigned Counsel will not be permitted to supplement his or her reply with additional documents after the audit is complete.
- e. An attorney's unclaimed correspondence of any kind shall be deemed received on the date of mailing.

### **3. FAILURE TO RESPOND**

An attorney who fails to respond to the Audit Letter shall be deemed to have waived his or her right to respond. In addition the attorney shall be subject to suspension from the eligibility to accept case assignments and the payment of bills.

- a. **Suspension of Bill Payments:** The Department, if it intends to suspend bill payments, shall notify the attorney in writing of its intention to suspend the payment of bills for failure to respond and the attorney shall have seven (7) days from the date of such notice to avoid suspension by submitting a complete response to the Audit Letter.
- b. **Suspension of Eligibility to Accept Assignments:** The Department shall notify the Attorney in writing of its intention to suspend the acceptance of assignments for failure to respond. The Department shall notify the attorney in writing of its intention to seek such approval. The attorney shall have seven (7) days from the date of such notice to avoid suspension by submitting a complete response to the Audit Letter.
- c. **Duration of Suspension:** Any suspension for failure to respond shall remain in effect until a complete response to the Audit Letter is received and reviewed by the Department.
- d. **Waiver:** The Department may elect to proceed with the audit irrespective of whether it suspends bill payments or assignments based upon the information available and the attorney shall be deemed to have waived his or her right to respond, to submit a written Rebuttal, or to request a hearing as provided herein.

### **D. DISPOSITION RECOMMENDATION**

At the conclusion of the audit process, Department staff may prepare a written Disposition Recommendation containing its findings and recommendations. Recommendations may include:

- 1. that no action be taken;

2. that the bill(s) in question be rejected or reduced;
3. that the attorney be required to repay monies to the Commonwealth;
4. that the attorney be suspended or removed from all Committee panels for a period of time or permanently;
5. that the Committee submit the findings to the Board of Bar Overseers;
6. that the Committee submit the findings to the Attorney General's or District Attorney's office;
7. that the Committee pursue all available civil remedies for the recovery of overpaid funds; and/or
8. other appropriate action.

## **E. RESPONSE TO DISPOSITION RECOMMENDATION**

1. An attorney who responded to the Audit Letter as provided in [item 2](#) above shall have ten (10) days from the date of receipt of the Disposition Recommendation to notify the Department in writing that he or she disputes the recommendation by filing a:
  - a. request for a hearing;
  - b. notice of intent to submit a written Rebuttal; or
  - c. notice of intent to submit a written Rebuttal and request for a hearing.
2. An attorney shall have thirty (30) days from the date of receipt of the Disposition Recommendation to submit a Rebuttal to the Department.
3. An attorney who fails to timely dispute the Disposition Recommendation as provided in (1) and (2) above shall be deemed to have waived that right.
4. An attorney who failed to respond to the Audit Letter shall be deemed to have waived his or her right to submit a Rebuttal or request a hearing.
5. The attorney's Rebuttal to the Disposition Recommendation shall be in the form of and limited to a written statement signed by the attorney specifically addressing the issues raised in the Disposition Recommendation. No other documentation or evidence shall be introduced.
6. The Department will forward the Disposition Recommendation and attorney's Rebuttal to the Hearing Officer for review. If a hearing has been requested, the attorney will be notified in writing of the date, time and location of the hearing. If no hearing has been requested, the attorney will be notified of the Hearing Officer's decision, in writing, within sixty (60) days.

## **F. SETTLEMENT OF CLAIMS**

The Department and attorney may at any time discuss settlement of an audit. In the event that a settlement is negotiated, the parties shall submit a proposed decision in

the appropriate form for the Hearing Officer's approval. The Hearing Officer may accept, reject or recommend modifications to the proposed agreement. Notwithstanding the agreement of the Department and the attorney, no settlement shall be binding upon either party until approved in writing by the Hearing Officer.

## **G. HEARINGS**

### **1. Hearing Officers**

- a. Any of the fifteen (15) members of the Committee for Public Counsel Services may serve as a Hearing Officer.

### **2. Scheduling of Hearings**

- a. The Department shall schedule a hearing within sixty (60) days from receipt of the attorney's written request.
- b. The Department and the attorney shall each have one automatic continuance of the hearing: (1) upon written request to the Hearing Officer; (2) with a copy to opposing party; and (3) not later than seven (7) days prior to the scheduled hearing.
- c. The Department and the attorney shall have no further continuances of the hearing except by agreement of the parties or in extraordinary circumstances: (1) upon written request to the Hearing Officer; (2) with a copy to the opposing party; and (3) allowed by the assigned Hearing Officer.

### **3. Burden of Proof**

At the hearing, the burden of proof shall be upon the Respondent attorney.

### **4. Standard of Review**

All hearings shall be conducted under the abuse of discretion standard of review.

### **5. Evidence**

- a. At the hearing, the evidence shall consist of the: (1) Audit Letter(s); (2) Documentation and Response to Audit Letter(s); (3) Disposition Recommendation; and (4) Written Rebuttal.
- b. The Respondent attorney and Department counsel or his or her designee shall each be limited to a 30-minute oral argument. Either party may waive oral argument.
- c. Respondent attorney and Department counsel or his or her designee shall limit oral argument to the issues raised in the (1) Audit Letter(s); (2) documentation and response to Audit Letter(s); (3) Disposition Recommendation; and (4) Written Rebuttal.
- d. The Respondent attorney and Audit and Oversight Counsel shall not introduce new evidence or documentation at the hearing.

e. Respondent attorney may be represented by counsel, but shall be limited to one oral argument.

**6. Recording of Proceedings**

The attorney may at his or her own expense hire a stenographer to record the proceedings provided: (1) the Department is sent written notice of such intent seven days prior to the hearing and (2) the attorney provides a copy of the transcript to the Department. No other form of recording shall be permitted.

**H. DECISIONS OF HEARING OFFICERS**

1. The Hearing Officer may approve, reject, or modify the Department's Recommendation, or take any other appropriate action.
2. The Hearing Officer shall have the discretion to decide any case by written decision with or without findings of fact. The parties may submit a proposed decision to the Hearing Officer.
3. The Hearing Officer shall present to the Executive Committee for approval and ratification on the record only that part of any decision which includes removal from Committee Panels or referral to the Board of Bar Overseers, Attorney General, or District Attorney.
4. In the event the Hearing Officer decides that there has been a violation of the Mass. Rules of Professional Conduct or any criminal law, the Committee shall submit its findings with specific references to any Rule or statute to the Board of Bar Overseers; and its findings with specific references to any pertinent criminal law to the Attorney General or the appropriate District Attorney.
5. The Hearing Officer shall render a decision within sixty (60) days of receipt of the Department's Disposition Recommendation or hearing date and forward that decision to the General Counsel for notification to the Respondent and the Department.
6. The decision of the CPCS Committee members serving as a Hearing Officer shall constitute the final decision of the agency.

**I. SUSPENSION, REMOVAL, FAILURE TO COMPLY AND RE-PAYMENT**

1. The Department shall suspend the eligibility to accept case assignments and the payment of all bills, and/or refer to appropriate agencies all attorneys who fail to comply with the decision of the Hearing Officer. Prior to any such suspension and/or referral, the Department shall notify the attorney in writing of the particulars of non-compliance and the attorney shall be granted ten (10) days to remedy said non-compliance.

2. Any attorney suspended pursuant to a decision of the Hearing Officer or for failure to comply with such decision shall not be eligible for reinstatement until the amount then due and owing has been paid in full.
3. Any attorney removed from panels pursuant to a decision of the Hearing Officer shall not be eligible to apply for reinstatement until the amount assessed for over-billings has been paid in full.
4. The Committee makes assignments to individuals and not firms. However, the Committee makes payments to individuals or firms. In the event that the Committee has been over-billed, the individual and firm are jointly and severally liable for repayment of amounts over-billed.

## **J. COMPLEX CASE REVIEWS**

1. A complex case review (CCR) occurs whenever an assigned attorney bills beyond a threshold amount based on the type of assignment. Each panel is responsible for oversight of counsel accepting cases and representing clients and performs pre-payment reviews of extraordinary bills submitted by Counsel as one form of oversight. The review is performed by the appropriate assigned counsel panel, division director, or his or her designee (hereinafter "Reviewer").
2. A case selected has an extraordinary number of hours billed and selection of these assignments and bills is automatic in Ebill. Immediately upon submission of the bill, Counsel is notified through an automated CCR Ebill notice advising that the review is being performed and additional information is needed prior to bill processing and payment.
3. The CCR letter lists with specificity the documents and information requested supporting the legal services provided and billed on the case and advises Counsel that the bill cannot be paid until the requested materials are received and reviewed. Additional bills submitted on the case may also be held pending review.
4. Assigned Counsel shall respond to the CCR letter by providing the specified documents and information within 30 days from the date the bill was submitted.
5. Redacted documents may be provided if necessary to protect the interest of the client or as required by statute or rule. Assigned Counsel shall provide a written description of any document withheld, including a listing of the date of the document, author of the document, number of pages and the reason for withholding.
6. Assigned Counsel may, at the time the documents are provided in response to the CCR letter, provide any additional information and/or documents he or she desires. Counsel may also provide any facts or issues he or she believes are relevant to a fair review of the work performed on the case/bill(s) submitted.
7. Following review of Assigned Counsel's response to the CCR letter, the Reviewer may request additional information as he or she deems necessary to

complete the review. It is the responsibility of Assigned Counsel to provide all requested documents. The Reviewer will not assume the existence of documents, relevant information or other facts not provided, and Counsel will not be permitted to provide additional documentation or evidence supporting the bill after the review is complete.

8. Assigned Counsel submitting the bill(s) to the Committee for payment is under a duty to cooperate in the CCR review (see [c. 2.A](#)). An attorney who fails to timely provide a complete response to the CCR letter or any subsequent requests for documentation/information will be subject to suspension of payments on all assigned cases and may be suspended from eligibility to accept assignments.
9. The Audit and Oversight Department may suspend Assigned Counsel's access to the Committee's electronic billing system, "E-Bill," until such time as a complete response to the CCR letter and any subsequent requests for documents and information is received and reviewed.
10. The Reviewer will advise the attorney of the outcome of the review within 60 days from the date of receipt of Counsel's complete reply or any further documentation provided or requested.
11. The Reviewer will provide a written statement advising counsel of the results and any action(s) taken. These actions may include but are not limited to the following:
  - a. That the bill(s) will be paid in the usual course in keeping with Committee Policy;
  - b. That the bill(s) will be reduced;
  - c. That the bill(s) will be rejected for payment;
  - d. That further payments on the case will be reduced/disallowed;
  - e. That a performance evaluation will be performed;
  - f. That counsel be referred to another CPCS panel, a bar advocate program, or the Audit and Oversight Department for further action;
  - g. That counsel be suspended from eligibility to accept new assignments or payments on some or all cases pending the outcome of any further appropriate action;
  - h. Such other action reasonably necessary to protect the interest of the client(s) and/or to prevent inappropriate or unreasonable billing;
12. The outcome of the review as provided in [\(11\)](#) above shall constitute the final decision of CPCS unless Counsel requests a review as set forth in [\(13\)](#) below.
13. Counsel, aggrieved by the outcome of a CCR review by the panel, may appeal the determination by sending an e-mail to the Audit and Oversight Department at [audit@publiccounsel.net](mailto:audit@publiccounsel.net) within 14 days of the date of the Reviewer's written statement as provided in [\(11\)](#) above stating any prejudicial errors he or she believes occurred during the CCR review by the panel.
14. The appeal will not consider any new or additional evidence or documents which were not provided by counsel to the panel reviewer prior to completion of the

review. The decision on the appeal will be sent via email to Counsel within 30 days.

15. The disposition of the review or appeal from the review determination shall constitute the final decision of CPCS fifteen days following the date of the letter disposing of the review as provided in (11) or upon transmittal of the decision on the appeal as provided by (13) above.

## **K. INTEREST RATE POLICY**

1. The Committee for Public Counsel Services shall impose interest on all audit assessments that are not paid within 30 days of the Hearing Officer's decision.
2. The interest rate shall be ten (10%) annually, calculated at the periodic rate of .0083330% per month.
3. The interest rate may be adjusted from time to time by the Committee.
4. This policy shall take effect July 1, 1997 upon all audits commencing on or after that date.
5. The Department shall be authorized to develop and propose additional procedures for the implementation of this policy.
6. Amounts assessed that are not paid in full within 30 days of the Hearing Officer's decision will be amortized over a period not to exceed 24 months. However, the Hearing Officer(s) shall retain the right to modify the two-year amortization period.
7. Interest shall be computed on the remaining unpaid balance at the approved rate(s) of interest in effect at the time the Disposition Recommendation is dated. The interest rate in effect for a particular audit shall not increase or decrease from the rate in effect on the day that the Disposition Recommendation is dated.
8. An amortization schedule shall be provided to each attorney upon request to the Department.
9. Attorneys must pay at a minimum the monthly amount due on or before the payment dates appearing on the amortization schedule.
10. Attorneys may pay the entire remaining unpaid balance (plus accrued interest) at any time by requesting a payoff amount from the CPCS audit staff.
11. Attorneys agree to abide by all of the Committee's interest rate policies and procedures.
12. Attorneys will not receive annual statements of interest paid, unless requested in writing. Audit staff shall be given 60 days from the date the written request is received to comply with such requests. Such statements of interest paid shall be in the form of updated amortization schedules.

## 8. Complaints Regarding the Performance and Conduct of Assigned Attorneys

### Chapter Contents

A. Preamble	8.1
B. Scope	8.1
C. Investigation Procedure	8.2
D. Subcommittee Review	8.5

#### A. PREAMBLE

Section 10 of G.L. c. 211D provides that the Committee for Public Counsel Services (“Committee”) shall “monitor and evaluate compliance with the standards and the performance of counsel in its divisions in order to insure competent representation of defendants in all courts of the commonwealth . . . .” Section 10 also provides that the Committee “shall establish a procedure for the review and disposition of client complaints.” In accordance with these mandates, the Committee has established the following procedures for the investigation and disposition of complaints or other allegations regarding inadequate attorney representation, attorney misconduct, or an attorney’s noncompliance with Committee performance standards, guidelines, policies, and other requirements.

#### B. SCOPE

These procedures apply to a private attorney who is certified to accept assignments under G.L. c. 211D and who is the subject of any of the following:

1. A complaint that the attorney has failed to provide competent representation to a client to whom he or she is or was assigned.
2. An allegation that the attorney has engaged in misconduct.
3. An allegation that the attorney is unable to or has failed to comply with performance standards, guidelines, policies, or other requirements that are contained in the Assigned Counsel Manual or are otherwise promulgated by the

Committee, provided that the allegation relates to the attorney's representation of or relationship with one or more of his or her Committee clients.

(All such complaints and allegations shall hereafter be referred to collectively as "complaints.") These procedures are not available to an attorney who is not fully certified or whose certification is provisional, probationary, or temporary.

Notwithstanding these procedures, service on all panels is at the discretion of the Chief Counsel.

## **C. INVESTIGATION PROCEDURE**

### **1. COMPLAINT INVESTIGATIONS**

Committee staff shall consider any complaint, regardless of the manner in which or the person (including Committee staff) by whom it is submitted. Complaints shall be investigated to the extent and in the manner deemed appropriate by the Chief Counsel or his or her designee.

Subject to staff availability, complaints alleging that an attorney is rendered unable to provide proper client representation due to illness, physical or mental, or substance abuse, or is charged with a crime or is subject to a decision by the Board of Bar Overseers to impose discipline, will be investigated within 15 days, with investigation beginning on the same day as the complaint, except for extension for good cause.

Complaints alleging neglect by failure to communicate with the client will be investigated within 15 days, except for extension for good cause.

All other complaints will be investigated within 30 days, except for extension for good cause. Extensions may be allowed by the Deputy Chief Counsel.

Notice shall be provided promptly to any attorney subject to a complaint if it is determined that investigation requires consultation with a third party outside of CPCS.

If a complaint is not investigated by Committee staff or a designee within the time periods specified above, this shall not affect the Committee's ability to take action

on the complaint. However, the attorney may argue that he or she has been prejudiced in his or her ability to defend against the allegations by the delay.

## **2. INTERIM REMEDIAL MEASURES**

If, at any time, the Chief Counsel or his or her designee determines that interim remedial measures are warranted to ensure that clients are adequately represented, he or she may take any action under [subsection \(4\)](#) on a temporary basis pending final resolution of the complaint.

## **3. ATTORNEY COOPERATION**

The subject attorney shall cooperate fully with requests and inquiries from the Chief Counsel or his or her designee regarding the investigation.

- a. If the attorney fails to respond to the complaint, the Chief Counsel or his or her designee may treat such non-response as a voluntary resignation from any panel of which the attorney is a member.
- b. If the attorney fails to cooperate fully with the investigation, the Chief Counsel or his or her designee may take any action under [subsection \(4\)](#).

## **4. COMPLAINT DISPOSITIONS**

Following the complaint investigation, the Chief Counsel or his or her designee may do any of the following:

- a. Conclude that no further action is warranted, in which case the matter shall be closed and shall remain confidential.
- b. Require remedial action, including but not limited to requiring the attorney to work with a mentor, requiring the attorney to attend continuing legal education programs, or limiting the attorney's caseload or the types of cases to which the attorney can be assigned.
- c. Suspend the attorney for a term or remove the attorney from one or more panels, while permitting the attorney to retain some or all of his or her current cases.

- d. Suspend the attorney for a term or remove the attorney from one or more panels and reassign some or all of the attorney's cases to other counsel.

The Chief Counsel or his or her designee may not finally dispose of a matter under paragraphs [\(b\)](#), [\(c\)](#), or [\(d\)](#) without first providing the attorney the opportunity to respond to the complaint and notice (under [subsection \(5\)](#)) of the proposed disposition. This requirement does not apply to interim remedial measures under [subsection \(2\)](#).

## 5. NOTICE

- a. Within two business days after any decision under [subsection \(3\)\(a\)](#), the Chief Counsel or his or her designee shall notify the attorney of the decision and the basis for the decision.
- b. Within 14 days after any decision under [subsection \(4\)\(b\)](#), the Chief Counsel or his or her designee shall notify the attorney of the decision and the basis for the decision.
- c. Within two business days after any decision under [subsection \(4\)\(c\)](#) or [\(4\)\(d\)](#), the Chief Counsel or his or her designee shall notify the attorney of the decision and the basis for the decision. If the decision is one that may be reviewed under [subsection \(6\)\(b\)](#), the notice shall also include a copy of these procedures.
- d. Any notice required under this subsection shall be by certified mail and email.

## 6. SCOPE OF REVIEW

- a. A decision under [subsection \(3\)\(a\)](#), [\(3\)\(b\)](#), or [\(4\)\(b\)](#) is final and is not subject to review.
- b. Except for suspensions or removals under [subsection \(3\)\(b\)](#), an attorney who is the subject of a suspension or removal under [subsection \(4\)\(c\)](#) or [\(4\)\(d\)](#) may request that the suspension or removal be reviewed by the Training and Qualifications Subcommittee ("Subcommittee") under [section \(D\)](#).

## **D. SUBCOMMITTEE REVIEW**

### **1. REVIEW PROCESS**

The following procedures govern matters subject to review under section [\(C\)\(6\)\(b\)](#):

- a. In order to obtain a review of a decision, the attorney must send a letter (“Review Request”) to the Chief Counsel requesting that the Subcommittee review the decision. The Review Request must be sent by certified mail and be postmarked within 20 days after the date of mailing of the notice under [section \(C\)\(5\)\(c\)](#).
- b. Within 20 days after receiving the Review Request, the Chief Counsel or his or her designee shall email the attorney a written summary of the investigation (“Investigation Report”). The Investigation Report shall include the information that formed the basis of the decision under section [\(C\)\(4\)\(c\)](#) or [\(C\)\(4\)\(d\)](#), including any documentary information.
- c. Within 20 days after the date on which the Investigation Report is emailed, the attorney shall provide the Chief Counsel or his or her designee a written response (“Attorney Response”) to the Investigation Report. The Attorney Response must state the bases for the attorney’s disagreement with the findings and recommendations of the Investigation Report. The Attorney Response may include any relevant documents. The attorney’s failure to provide a timely Attorney Response shall result in dismissal of the attorney’s Review Request.
- d. The Chief Counsel or his or her designee may prepare a Supplemental Report to address issues raised in the Attorney Response. This Supplemental Report shall be emailed to the attorney at least ten days before the matter is considered by the Subcommittee.
- e. All matters shall be decided by the Subcommittee on the papers described in this subsection, unless the Chairperson of the Subcommittee determines that a hearing is warranted. If the Chairperson of the Subcommittee determines that a hearing is warranted, the Chairperson shall notify the Chief Counsel or his or her designee, who shall, after consultation with the attorney and the members of the Subcommittee, schedule a date for hearing.

## 2. SUBCOMMITTEE HEARING

- a. The attorney may be represented by counsel at a hearing before the Subcommittee.
- b. Upon request by the Subcommittee, the Chief Counsel or his or her designee shall orally summarize the complaint and the results of the investigation and state the decision made under section [\(C\)\(4\)\(c\)](#) or [\(C\)\(4\)\(d\)](#).
- c. The attorney shall limit his or her oral response to the issues raised in the documents submitted under [subsection 1](#).
- d. The Chief Counsel or his or her designee shall limit his or her rebuttal to the issues addressed by the attorney in his or her oral response.
- e. The attorney and the Chief Counsel or his or her designee, at the discretion of the Subcommittee, may present witnesses whose testimony is relevant to the issues raised in the documents submitted under [subsection 1](#). **The Subcommittee may exclude any witness or proffer if the testimony would be irrelevant or duplicative.** The parties may provide affidavits from witnesses in lieu of live testimony, but only if the affidavits have been submitted to the Subcommittee and the opposing party at least ten days before the hearing.

## 3. SUBCOMMITTEE DECISION

- a. Any decision by the Subcommittee must be made by a majority of the members considering the matter. The Subcommittee shall decide the matter within 20 days after receiving the papers or, if a hearing is held, within 20 days after the hearing.
- b. The standard of review to be applied by the Subcommittee to actions of the Chief Counsel or his or her designee shall be whether the action has a reasonable basis. The Subcommittee's decision shall be final.
- c. The Subcommittee's decision shall be in writing and provided to the attorney and the Chief Counsel.

## 9. Appendix - Assigned Counsel Forms

- [Payment Voucher Form](#)
- [Waiver of Ten \(10\) Hour Daily Billing Limit Form](#)
- W-9 Form (please email [vendorinfo@publiccounsel.net](mailto:vendorinfo@publiccounsel.net) for DocuSign form)
- [Private Attorney Ebill 2.0 Access Agreement](#)
- EFT (Electronic Funds Transfer) Form (please email [vendorinfo@publiccounsel.net](mailto:vendorinfo@publiccounsel.net) for DocuSign form)

The *SAMPLE* forms below can be used as a guide when reading chapters five and six of the *Assigned Counsel Manual*:

- [Dispositional Report Form](#)
- [Notice of Assignment of Counsel Form](#)
- [Payment Voucher Form – Instructions](#)